No. 98-591

In the

Supreme Court of the United States

OCTOBER TERM, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOINT APPENDIX
VOLUME I of II
PAGES 1-196

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Petition for Certiorari Filed October 6, 1998
Certiorari Granted January 8, 1999

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VOLUME I

VOLUME II

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 29, 1995 - Plaintiff Kirkingburg filed amended complaint in the United States District Court for the District of Oregon.
July 7, 1995 - Defendant Albertsons filed answer with affirmative defenses and counterclaims.
Sept. 15, 1995 - Defendant Albertsons filed motion for summary judgment, memorandum in support of motion for summary judgment, affidavit of Michael V. Tom, affidavit of Dona Pike King, affidavit of Scott Jardine and affidavit of Tammy Polk.
Sept. 29, 1995 - Plaintiff Kirkingburg filed memorandum in opposition to defendant's motion for summary judgment.
Sept. 29, 1995 - Plaintiff Kirkingburg filed statement of facts in support of memorandum in opposition to defendant's motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed motion for leave to file amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed memorandum in support of amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed statement of facts in support of amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed affidavit of Dona Pike King in support of amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed affidavit of Tammy Polk in support of amended motion for summary judgment.
Oct. 2, 1995 - Defendant Albertsons filed affidavit of Scott Jardine in support of amended motion for summary judgment.

Oct. 2, 1995 - Defendant Albertsons filed affidavit of Michael V. Tom in support of amended motion for summary judgment.
Oct. 3, 1995 - Record of order by Honorable Owen M. Panner granting defendant's motion for leave to file amended motion for summary judgment.
Oct. 11, 1995 - Plaintiff Kirkingburg filed supplemental additional concise statement of material facts in dispute.
Oct. 13, 1995 - Defendant Albertsons filed reply memorandum to plaintiff's memorandum in opposition to defendant's motion for summary judgment.
Oct. 18, 1995 - Plaintiff Kirkingburg filed motion to submit additional materials in opposition to defendant's motion for summary judgment.
Oct. 18, 1995 - Plaintiff Kirkingburg filed motion to supplement materials in opposition to defendant's motion for summary judgment.
Oct. 21, 1995 - Record of order by Honorable Owen M. Panner granting plaintiff's motion to supplement materials in opposition to defendant's motion for summary judgment.
Oct. 21, 1995 - Record of order by Honorable Owen M. Panner granting plaintiff's motion to submit additional materials in opposition to defendant's motion for summary judgment.
Oct. 25, 1995 - Opinion by Honorable Owen M. Panner granting defendant's motion for summary judgment.
Oct. 26, 1995 - Plaintiff Kirkingburg filed motion for reconsideration.
Nov. 6, 1995 - Defendant Albertsons filed memorandum in opposition to plaintiff's motion for reconsideration.
Nov. 9, 1995 - Order by Honorable Owen M. Panner denying plaintiff's motion for reconsideration
Dec. 15, 1995 - Judgment of dismissal.
Dec. 22, 1995 - Plaintiff Kirkingburg filed notice of appeal.

Aug. 27, 1996 - Kirkingburg filed appellant's opening brief with the United States Court of Appeals for the Ninth Circuit.
Oct. 9, 1996 - Albertsons filed answering/opening brief of defendant/appellee.
Nov. 12, 1996 - Kirkingburg filed appellant's reply brief.
May 11, 1998 - Opinion and judgment entered by United States Court of Appeals for the Ninth Circuit.
May 23, 1998 - Albertsons filed petition for rehearing and suggestion for rehearing en banc.
July 1, 1998 - Order, amended opinion, and judgment entered by United States Court of Appeals for the Ninth Circuit.
July 8, 1998 - Order entered denying petition for rehearing and suggestion for rehearing en banc.
July 10, 1998 - Judgment entered, reversing District Court's award and remanding for further proceedings.
Oct. 6, 1998 - Albertsons filed petition for a writ of certiorari to the Supreme Court of the United States.
Nov. 9, 1998 - Kirkingburg filed brief in opposition to petition for a writ of certiorari.
Nov. 18, 1998 - Albertsons filed reply brief.
Jan. 8, 1999 - Supreme Court of the United States granted Albertsons' petition for a writ of certiorari.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG, Plaintiff, v. ALBERTSON'S, INC., a Delaware corporation, Defendant.	)	No. CV95-549-PA AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL (Disability Discrimination)

Plaintiff alleges:

I.

JURISDICTION AND VENUE

1. This is an action brought pursuant to the

Americans with Disabilities Act, 29 U.S.C. § 12110, et. seq.

2. This Court has jurisdiction of the claim pursuant to 28 U.S.C. § 1331.

3. All of the acts and omissions alleged herein in the District of Oregon.

II.

4. Plaintiff is a resident of the State of Oregon.

5. Defendant is a private corporation.

III.

STATEMENT OF CLAIMS

CLAIM ONE

(ADA)

6. Plaintiff was employed by Defendant as a truck driver until November 20, 1992 when he was terminated.

7. Plaintiff's visual acuity is 20/200 in his left eye. Defendant regarded Plaintiff as having a physical impairment on this account.

8. On December 3, 1991 Plaintiff sustained a compensable injury. Following his release for full duty Defendant subjected him to a physical examination. Defendant took the position that Plaintiff did not meet U.S. Department of Transportation vision requirements. He was told he could not drive without a vision waiver.

9. Subsequently, Plaintiff was denied reasonable accommodation and was discriminated against by Defendant in one or more of the following particulars:

(a) Defendant did not wait a reasonable period of time to allow Plaintiff to obtain a vision waiver;

(b) Defendant would not allow Plaintiff to return to work as a driver even with a vision waiver; and/or

(c) Defendant failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work.

10. As a result of said acts Plaintiff has suffered emotional distress in the sum of $300,000.

11. As a result of said acts Plaintiff has suffered economic loss in an amount to be proven at trial, which sum is alleged to be approximately $500,000.

12. Defendant's acts were wilful and wanton and Defendant should be assessed punitive damages in the sum of $300,000.

13. Plaintiff is entitled to his reasonable attorneys' and expert witness' fees under the Act. 42 U.S.C. 12110, et. seq.

14. Plaintiff timely filed charges with the appropriate civil rights administrative agency and this case was filed within 90 days of receipt of a right to sue letter.

DEMAND FOR JURY TRIAL

15. Plaintiff demands a jury trial.

WHEREFORE, Plaintiff prays for judgment as stated in his claims alleged above.

DATED this 29th day of June, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

ANSWER WITH AFFIRMATIVE DEFENSES AND COUNTERCLAIM

For answer to plaintiff's Amended Complaint and demand for jury trial, defendant Albertsons, Inc. ("Albertsons") admits and denies as follows:

1.

Albertsons admits that plaintiff brings an action under the auspicious of the American with Disabilities Act, 29 U.S.C. §12110 et seq. at paragraph 1 of plaintiff's Amended Complaint.

2.

Albertsons admits the allegation at paragraph 2 of plaintiff's Amended Complaint.

3.

Albertsons admits that the alleged actions complained of occurred within the District of Oregon.

4.

Albertsons admits the allegations of paragraph 4 of plaintiff's Amended Complaint that plaintiff is a resident of the State of Oregon.

5.

In response to paragraph 5 of plaintiff's Amended Complaint, Albertsons admits that Albertsons is a public corporation.

6.

In response to paragraph 6 of plaintiff's Amended Complaint, Albertsons admits that it processed the initial termination papers November 20, 1992 because there was not a job at the time for which plaintiff was qualified and that when Albertsons had a job for which plaintiff was qualified,

he was offered, but refused, the position.

7.

Albertsons admits that plaintiff's visual acuity has been reported as 20/200 in his left eye. Albertsons denies the remaining allegations at paragraph 7 of plaintiff's Amended Complaint and the whole thereof not expressly admitted here.

8.

Albertsons admits that on December 3, 1991, plaintiff sustained an on-the-job injury which Albertson's workers compensation carrier determined was compensable. Albertsons admits that following plaintiff's release for full duty, Albertsons required plaintiff to undergo a physical examination. Albertsons admits that the results of the physical examination indicated that plaintiff did not meet the United States Department of Transportation vision requirements. Albertsons denies the remaining allegations at paragraph 8 of plaintiff's Amended Complaint and the whole thereof not expressly admitted here.

9.

Albertsons denies the allegations at paragraph 9 of plaintiff's Amended Complaint and the whole thereof.

10.

Albertsons denies the allegations at paragraph 10 of plaintiff's Amended Complaint and the whole thereof.

11.

Albertsons denies the allegations at paragraph 11 of plaintiff's Amended Complaint and the whole thereof.

12.

Albertsons denies the allegations at paragraph 12 of plaintiff's Amended Complaint and the whole thereof.

13.

Albertsons denies the allegations at paragraph 13 of plaintiff's Amended Complaint and the whole thereof.

14.

Albertsons admits the allegations at paragraph 14 of plaintiff's Amended Complaint.

15.

Albertsons admits that at paragraph 15 of his Amended Complaint plaintiff has demanded a jury trial.

16.

Albertsons denies each and every allegation of plaintiff's Amended Complaint and the whole thereof not expressly admitted herein.

For its FIRST AFFIRMATIVE DEFENSE, Albertsons realleges those matters admitted above and further alleges:

17.

Plaintiff's Amended Complaint has failed to state a claim on which relief can be granted.

For its SECOND AFFIRMATIVE DEFENSE, Albertsons admits and alleges as it has above and further alleges:

18.

Plaintiff has failed adequately to mitigate his damages.

For its THIRD AFFIRMATIVE DEFENSE, Albertsons admits and alleges as it has above and further alleges:

19.

Plaintiff's allegations, and each of them, fail to support an award of punitive damages.

For its FIRST COUNTERCLAIM, Albertsons realleges those matters admitted and alleged above and further alleges:

20.

Plaintiff's claims against Albertsons are meritless and frivolous and Albertsons is entitled to its reasonable attorney

fees, expert witness fees, costs and disbursements under 42 USC §1220, et seq.

WHEREFORE, having fully answered plaintiff's Amended Complaint, Albertsons prays for judgment against plaintiff:

1. Dismissing this action with prejudice; and
2. Awarding Albertsons its reasonable attorney fees, costs and disbursements and whatever other damages this Court deems just and equitable.

Respectfully submitted this 7th day of July, 1995.

GORDON, McKEON & RIVES

By: s/ Corbett Gordon
Corbett Gordon, Attorneys for
Defendant Albertson's, Inc.

(Certificate of Service omitted in printing)

(Caption omitted in printing)

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully submits the following memorandum in opposition to Defendant's Motion for Summary Judgment.

I.
STATEMENT OF FACTS

Plaintiff was first employed by Defendant as a truck driver in 1990. Pl. Depo. 165.

Plaintiff was born May 21, 1938. Pl. Depo. 8. He has an associate degree from Cerritos Junior College in Norwalk, California. Pl. Depo. 10. He was a jet aircraft mechanic in the United States Air Force, where he was a crew chief to a basic air commander. Pl. Depo. 12-14. He was honorably discharged. Pl. Depo. 14. From 1969 to 1978 or 1979 he was an auto mechanic for Los Angeles County. Pl. Depo. 148-9. He also did some road test driving for the county. Pl. Depo. 150-1. He left the county to drive trucks, first for Global Van Lines, then as an independent trucker. Pl. Depo. 150, 152, 153. He owned his own Kenwood truck. Pl. Depo. 153-4. He moved to Oregon in 1980 or 1981 where he settled in Tillamook County and won the county garbage hauling contract. Pl. Depo. 155-7. He kept that contract until 1988 or 1989, when he began driving trucks for Pastega Trucking. Pl. Depo. 159-61. He continued driving for Pastega until he began work for Albertson's as a truck driver in 1990. Pl. Depo. 165.

Plaintiff has a good driving record. Pl. Depo. 234-235, 280-281. He has never been in an accident that was his fault. Id. He has no disqualifying moving citations on his

driving record. Id., Ex. 3; Sturgill Depo. 38.

At the time Plaintiff was hired by Defendant, Ted Sturgill, transportation manager, gave him a 16 mile road test and certified, "It is my considered opinion that his [sic] driver possesses superior driving skill to operate safely the type of commercial motor vehicles listed above." Ex. 20, Sturgill Depo. 47-48. The reference listed above was to a 1988 Kenworth, with a 1989 50' utility trailer. Ex. 20. Mr. Sturgill found Mr. Kirkingburg to be a safe driver in that road test. Sturgill Depo. 47-48. Plaintiff was given a physical examination and passed at the time of his hire in 1990. Sturgill Depo. 34-5; Ex. 22. He had a valid Department of Transportation (DOT) card to drive a truck at that time. Id. at 36. Thereafter, Mr. Sturgill found Plaintiff to be a safe driver. Sturgill Depo. 32. Likewise, his boss, Frank Riddle, General manager, found Plaintiff to be a good, safe driver. Riddle Depo. 5, 6, 14-15. Plaintiff had a valid DOT card in 1991. Sturgill Depo. 34, Ex. 23.

Plaintiff has always had 20/200 corrected vision in his left eye. Pl. Depo. 42-43. He is 20/20 corrected in his right eye. Id. The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity not correctable by refraction means and not attributable to an eye disease. Aff. of Beatrice Michel; Ex. 24. The condition is said to exist if the vision is 20/30 or worse with best correction. Id. With that condition he could easily perform the driving tasks required of him, in the opinion of his doctor. Id. The amblyopia in the left eye does not interfere with his ability to drive. Id. According to Plaintiff, the condition has never interfered with his work. Pl. Depo. 46.

Plaintiff suffered a work-related injury in 1991 when he had a fall from a truck and hurt his head, shoulder and hand. Pl. Depo. 36-37. He was released unconditionally to

return to work on November 3, 1992. Pl. Depo. 91, 252; Ex. 29. Instead of returning Plaintiff to work, Defendant sent Plaintiff to its doctor for examination. Pl. Depo. 92. Plaintiff saw a Dr. Douglas Eubanks, who gave him an unusually thorough examination. Pl. Depo. 94. He was told he needed a "vision waiver." Pl. Depo. 95. Dr. Eubanks found his vision to be 20/200 in his left eye as of November 6, 1992. Ex. 17. The doctor noted that this was his corrected vision in that eye "since birth." Id.

Defendant's drivers are to be certified by the Department of Transportation (DOT). Riddle Depo. 11-13; Sturgill Depo. 32. Defendant has no physical requirements for vision other than what is contained in DOT regulations. Id. DOT regulations call for a minimum 20/40 vision corrected in each eye. Ex. 34. There is nothing in writing at Albertson's which specifically adopts those physical requirements as its own. Sturgill Depo. 24. Prior to November 6, 1992 the DOT instituted a vision waiver program whereby under certain limited circumstances it would issue waivers to allow drivers who could not meet the minimum vision qualifications of DOT to operate motor vehicles. Sturgill Depo. 57; Ex. 43. The purpose of the program was to accommodate individuals where it was reasonable to do so under the Americans With Disabilities Act, but not sacrifice highway safety. Federal Register, Vol. 57, No. 58 at 10295 (March 25, 1992).

On November 20, 1992 Ted Sturgill called Plaintiff and informed him that "We're not going to accept the waiver." Pl. Depo. 69-70; Ex. 25. It was Mr. Sturgill's understanding that Plaintiff was terminated for failure to pass a DOT physical. Sturgill Depo. 9. This was not his decision. Sturgill Depo. 9. He does not know who made the final decision, but believes it came from "Boise Legal." Sturgill Depo. 9. That decision was communicated to him by Mr.

Frank Riddle. Id. Mr. Riddle told him that Plaintiff had failed the visual part of the DOT physical and that the company would not accept a vision waiver. Id. at 10. Mr. Riddle told him Plaintiff was "legally blind or blind in one eye." Sturgill Depo. 25. Mr. Sturgill testified there was no other reason for the termination. Id. at 20. Mr. Sturgill testified that Mr. Riddle directed him to terminate Plaintiff. Id. at 22. Prior to that time, Mr. Sturgill had seen nothing in writing that the company would not accept vision waivers. Sturgill Depo. 24. A termination form was completed for Plaintiff at that time. Norris Depo. 9; Ex. 26.

Mr. Sturgill recalls discussion about other positions for Plaintiff to perform. Sturgill Depo. 22. He does not recall if there was discussion about other work for Plaintiff before his termination. Sturgill Depo. 23. Mr. Sturgill did not try to find Plaintiff work. Sturgill Depo. 30. Mr. Riddle was aware that the employer had to reasonably accommodate disabled persons and testified he believed efforts were made by the company to find other jobs for Plaintiff. Riddle Depo. 9, 10, 11, 22. He expected his subordinate to look for other work for Plaintiff, specifically Charlie Norris was expected to do that. Riddle Depo. 24. He testified that had Plaintiff not turned down a "yard hostler" and "tire man" positions he would be employed there today. Riddle Depo. 57-58.

Defendant did make some contacts with Plaintiff to offer him other positions. Pl. Depo. 4-5. Plaintiff was an injured worker who under Oregon Law had reinstatement rights. Pl. Depo. 29 (ORS 659.415 and 659.420). Further, Defendant's own policy required reasonable accommodation. Ex. 1; Norris Depo. 24. In addition, as memorialized in the Scott Jardine, Corporate Director of Transportation, memorandum of June 4, 1993: "In situations where reasonable accommodation to a driver with a disability are legally required, our priority is to accommodate the driver in

ways other than a DOT minimum qualification waiver." Ex. 43; Sturgill Depo. 57.

Plaintiff remembers a call about a job moving trailers which he thought he had. Pl. Depo. 4. This was a "yard hostler" position. A "yard hostler" drives trailers within the confines of the facility, moves empty trailers into the dock, loads ones away from the dock, and stages them for dispatch. Riddle Depo. 27; Sturgill Depo. 31. Although DOT certification is required for that position, it does not have to be. Riddle Depo. 40. The position is designed so it can be retained in the yard. Riddle Depo. 41. The hostlers are not allowed on the road. Id. at 40. The equipment they operate are not road licensed to begin with. Id. at 40. If they are out on the road they are "in violation." Riddle Depo. 40. The job is required seven days a week, 24 hours a day, is staffed with 5 or 6 positions, which positions can be temporary or permanent. Id. at 40, 42-43.

This was the first job Defendant spoke with Plaintiff about. Pl. Depo. 77; Ex. 41. Plaintiff was asked by his union rep to call Frank Riddle, which he did. Pl. Depo. 77. Mr. Riddle said he did not know about it and that he would have Frank Sturgill call back. Pl. Depo. 78. Mr. Sturgill called back and said Plaintiff was supposed to go to the Portland distribution center, which he did. Pl. Depo. 78. After a one hour wait, Mr. Sturgill rudely asked Plaintiff if he had a DOT card, and Plaintiff replied he did and showed it to him. Pl. Depo. 79. By this time, Plaintiff had obtained a DOT vision waiver and a valid DOT card. Pl. Depo. 80. Mr. Sturgill gave Plaintiff papers to read on how to hook up a trailer and asked him to wait in the lunchroom. Pl. Depo. 80. Then Dave Cooper, dispatch supervisor, told Plaintiff that Mr. Sturgill said to take the papers home and read them, "We'll be calling you." Pl. Depo. 80-81. Plaintiff went home, but was never called. Pl. Depo. 81. He was never given an

explanation why he did not get that job. Pl. Depo. 5. Mr. Riddle was told by Don King, an attorney with Albertson's, that Plaintiff had turned down the yard hostler position. Riddle Depo. 55. Plaintiff never turned it down. Pl. Aff.

Subsequently, Defendant informed the Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." Ex. 48. Mr. Riddle was unaware the offer had been withdrawn. Riddle Depo. 29. Mr. Norris was unaware it had been made. Norris Depo. 34.

Sometime later, the second job which was discussed with Plaintiff was a "tire man," but Plaintiff rejected that position because he had never changed a truck tire in his life, was told it would be $8 - $9 per hour, $5 - $6 less than what he had been making, and would not get him back to driving trucks. Pl. Depo. 85-87. He also recalls that there was an experience requirement for that job that he did not satisfy. Pl. Depo. 101.

Other jobs which became available, but which were not discussed with Plaintiff, included warehouse and dispatcher positions. Riddle Depo. 22, 23; Cooper Depo. 5, 7.

Although Defendant claimed it would not allow its drivers to drive unless they met the minimum DOT vision physical requirement of 20/40 corrected vision in each eye (Ex. 47), Plaintiff was allowed to drive for it when first hired in 1990 despite a corrected vision of 20/70 in his left eye, according to a company doctor, Robert Eubanks, Ex. 22, and was permitted to drive in 1991 despite a corrected vision of 20/100 in his left eye, according to a different company doctor, Theresa Eubanks. Sturgill Depo. 52; Ex. 23. These reports were in Defendant's possession at the time, and raised no "red flags" so to speak. Sturgill Depo. 25, 26, 28, 32-3, 36, 48, 49; Pl. Depo. 262-4. No effort was made to disqualify

him. Sturgill Depo. at 33. He was thought to be a safe driver. Sturgill Depo. at 32.

Defendant's personnel manager was aware of its reasonable accommodation requirement, but knows of no undue hardship which would have been caused to it by accepting a vision waiver. Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Sturgill Depo. 37. Yet, Mr. Riddle testified that when Plaintiff drove for Albertson's he was not a safety hazard. Riddle Depo. 31.

Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements, but if the DOT said to accommodate disabled persons it may waive certain of those requirements, this would not be acceptable. Riddle Depo. 13.

Mr. Riddle said according to the reports he saw, Plaintiff's vision was deteriorating. Riddle Depo. 15. He testified that before making the decision to terminate, he instructed Charlie Norris, personnel manager, to review Plaintiff's vision file with Plaintiff. Riddle Depo. 16-18. This never happened. Norris Depo. 9-10; Pl. Aff. It was not true that Plaintiff's vision had been deteriorating. Pl. Aff.; Aff. of Beatrice Michel; Ex. 24. Plaintiff's vision in his left eye tested out by his own doctor at 20/200 in 1988 and on October 19, 1992. Ex. 16; Ex. 21. There was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Sturgill Depo. 58.

After Plaintiff's termination, he received a vision waiver from the DOT. Pl. Depo. 75. This was obtained on February 25, 1993. Id.; Ex. 36; Ex. 37. He had requested Defendant's help in obtaining the waiver in December 1992 because the DOT required that the employer provide certain of the information necessary to obtain the waiver. Ex. 32. He had first applied for the waiver on November 12, prior to

the November 20 call terminating his employment. Ex. 32. Defendant's personnel manager was instructed by Mr. Riddle not to respond to the request. Norris Depo. 32; Riddle Depo. 43. Mr. Riddle told him he would take that up with the corporate people. Riddle Depo. 43. Plaintiff advised Defendant he obtained the vision waiver on March 1, 1993. Ex. 39; Ex. 40. Mr. Sturgill became aware he had received it. Sturgill Depo. 56.

Plaintiff had also requested to be reinstated on December 18, 1992. Ex. 29. That request was denied. Ex. 34.

Plaintiff was identified by Defendant as the "driver with the vision problem in Portland" by Scott Jardine on January 29, 1993. Ex. 35.

II.
STATEMENT OF LAW

A. Defendant's Motion for Summary Judgment On Plaintiff's Disability Discrimination Claim Should Be Denied.

1. Plaintiff Has Adduced Evidence Which Raises A Question of Fact As To Whether He Could Perform The Essential Functions Of His Job And As To Whether Defendant Failed To Accommodate His Impairment.

(a) Plaintiff Is Physically Impaired.

Plaintiff has disability/perceived disability discrimination claims based upon his visual impairment under the American With Disabilities Act (hereafter "the ADA"), 42 U.S.C. §12101, et. seq., which prohibits discrimination in the terms, conditions and privileges of

employment against an individual with a disability. 42 U.S.C. §12112.

Under the ADA an individual is protected if he or she is:

> "(1) a person with a physical or mental impairment that substantially limits one or more major life activities;
>
> (2) a person with a record of such physical or mental impairment; or
>
> (3) a person is regarded as having such an impairment."

42 U.S.C. §12102(2). The ADA defines a physical impairment as:

> "[a]ny physical disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs . . . "

29 C.F.R. §1630.2(h).

A "major life activity" is defined to include seeing or working. 29 C.F.R. App. §1630.2(i).

The ADA is patterned after the Rehabilitation Act of 1973, Pub.L.No. 93-112, 87 Stat. 355, codified as amended at 29 U.S.C. §2 701-796i, and therefore it is appropriate when examining it to examine the scope of the federal law on which it is based. 29 C.F.R. §1630.1(c).

It has been held under the Rehabilitation Act of 1973 that someone who is legally blind is a handicapped individual. Norcross v. Sneed, 573 F.Supp. 533, 536 (W.D.

Ark. 1983), aff'd, 755 F.2d 113 (8th Cir.); see Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D. Pa. 1976), aff'd, 556 F.2d 184 (3rd Cir. 1977) (a blind person "is certainly" a handicapped person under the Rehabilitation Act). In McNutt v. Hills, 426 F.Supp. 990 (D.D.C. 1977), the court implicitly held that the individual, who had retinitis pigmentosa, was handicapped under the Rehabilitation Act in its discussion of jurisdiction and mandamus. 426 F.Supp. at 998 fn. 19. It has also been held that someone with extremely poor sight is handicapped under the Rehabilitation Act. Sharon v. Larson, 650 F.Supp. 1396, 1401 (E.D. Pa. 1986) (it is not disputed that an individual who had visual acuity with the right eye of 20/200 and visual acuity with the left eye of 20/300 using corrective lenses is handicapped under the Act); see generally Francis M. Dougherty, Who is "Individual With Handicaps" Under The Rehabilitation Act of 1973 (29 USCS §§701 et. seq), 97 ALR Fed 40, §4[b] and 4[c], pp. 58-60.

Here, Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather, Defendant argues Plaintiff is not an otherwise qualified individual.

(b) Plaintiff Is A Qualified Individual With A Disability.

The ADA prohibits discrimination against any "qualified individual" with a disability. 42 U.S.C. §12112. Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The analysis under the ADA is two step: first, whether the individual satisfies the prerequisites for the position; and,

second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Whether a particular function is essential is a factual determination that must be made on a case by case basis, considering all relevant evidence. 29 C.F.R. App. §1630.2(n).

Here, there is a question of fact as to whether Plaintiff could perform the essential function of truck driving. Plaintiff had performed the duties of the position without being at fault in an accident since his hire. Pl. Depo. 234-235, 280-281. His supervisors tested him and believed he was a safe driver. Sturgill Depo. 32, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 20. His amblyopia in the left eye did not interfere with his ability to drive, never interfered with his work, and in the opinion of his doctor even with the condition he could still easily perform the driving tasks required of him. Pl. Depo. 46; Aff. of Beatrice Michel; Ex. 24. In sum, there is evidence which raises a question of fact as to whether Plaintiff could perform the essential function of truck driving.

Defendant argues that Plaintiff was not otherwise qualified because Plaintiff did not meet the DOT minimum requirements for interstate truck driving, which Defendant considers to be an essential requirement of the job. Def's Memo. at 6. The premise of Defendant's argument is that Plaintiff needed to meet the DOT physical requirements for interstate truck driving and that therefore those physical requirements somehow equate to an essential function of the job. However, it is not the DOT vision requirements that are an essential function of the job; it is the DOT certification. See Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Ex. 43.

Defendant has no physical requirements for vision other than what is contained in the DOT regulations. Riddle Depo. 11-13; Sturgill Depo. 32. Plaintiff's argument that the

DOT vision requirements are not truly an essential function of the job is strengthened by the fact that although Defendant claimed it would not allow drivers to drive unless they met the minimum DOT vision requirement in each eye,[1] Plaintiff was hired to drive in 1990 despite a corrected vision of 20/70 and permitted to drive in 1991 despite a corrected vision of 20/100. Sturgill Depo. 52; Ex. 23; Ex. 47. Indeed, these reports of supposedly deficient vision did not raise any concerns ("red flags") at the time and no attempt was made to disqualify Plaintiff. Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49; Pl. Depo. 262-4. Thus, evidence exists that raises a question of fact as to the first step in the essential functions analysis: Plaintiff could perform the essential functions of the job.

The second step of the analysis is whether any reasonable accommodation can be made by the employer that would enable Plaintiff to perform the function of his job. Defendant relies upon Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, ____ U.S. ____, 114 S.Ct. 1386 (1994) to argue that as a matter of law a truck driver with impaired vision who does not meet the DOT requirements in 49 C.F.R. §391.41 cannot be reasonably accommodated because of the inherent safety risk. Defendant's reliance on Chandler is misplaced, for the issue of a DOT vision waiver was not addressed in that case.

In a later case, Sarsycki v. United Parcel Service, 862 F.Supp. 336 (W.D. Okl. 1994), the court noted that "the Chandler holding has been undermined by the fact that the FHWA [Federal Highway Administration] has recently instituted a waiver program for . . . drivers of commercial

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[1] DOT requirements are corrected vision of at least 20/40 in each eye. Ex. 47.

motor vehicles which the FHWA believes is 'consistent with the safe operation' of those vehicles." 862 F.Supp. at 341 (discussing insulin-dependent drivers). As the court noted in Sarsycki, "[t]his change in policy was partly a result of an ADA mandate requiring the FHWA to conduct a review of its regulations 'in order to ascertain whether the standards conform with the current knowledge about the capabilities of persons with disabilities.'" Id., citing 58 Fed. Reg. 40,693 (1993). Although the court in Sarsycki was discussing insulin-dependent drivers, the analysis is equally applicable to the present case and the criticism of Chandler equally apt.

The problem with Defendant's safety risk defense, and the analysis in Chandler on which it relies, is that an "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." Bombrys v. City of Toledo, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993) (blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates ADA); accord Anderson v. Little League Baseball, Inc., 794 F.Supp. 342, 345 (D. Ariz. 1992). Indeed, the requirement for individualized assessments was one of the reasons for the DOT's waiver program. Federal Register, Vol. 57, No. 58 at 10295. Here, if such an individualized assessment had occurred, Defendant would have allowed Plaintiff to continue to drive, for Mr. Riddle believed that when Plaintiff drove for Defendant he was not a safety hazard. Riddle Depo. 31. Indeed, Plaintiff has had this same visual impairment since birth and has driven trucks for Defendant and others for years without incident. Pl. Depo. 42-43, 150-57, 159-61, 165, 234-235; Ex. 3; Sturgill Depo. 38.

Defendant's blanket disqualification of Plaintiff is evidenced by Mr. Riddle's testimony that Defendant would accept changes in DOT minimum requirements, but if the

DOT said to accommodate disabled persons it may waive certain of those requirements, it would be unacceptable. Riddle Depo. 13. Furthermore, there was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Sturgill Depo. 58. Having failed to conduct an individualized assessment of the relative safety risks, Defendant is not entitled to judgment as a matter of law on the issue of whether Plaintiff was an otherwise qualified individual with a disability.

(c) No Reasonable Accommodation Was Attempted.

The term "reasonable accommodation" is an open-ended one. Schmidt v. Safeway, Inc., 864 F.Supp. 991, 996 (D. Or. 1994). The statutes and regulations offer examples, but caution that the term is not limited to those examples. Id., citing 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. Pt. 1630, App. "An employer may, in appropriate circumstances, have to consider the provision of leave to an employee as a reasonable accommodation, unless the provision of leave would impose an undue hardship." Schmidt v. Safeway, Inc., supra, 864 F.Supp. at 996 (citations omitted). Here, one possible reasonable accommodation not given was leave to obtain a vision waiver.

In the present case, sandwiched into its "Plaintiff is not a qualified individual" argument, Defendant argues it took steps that satisfy any reasonable accommodation requirement that may exist. Defendant cites to its offer of a job as "yard hostler" and later as a "tire man." Indeed, Mr. Riddle testified that had Plaintiff not turned down the "yard hostler" and "tire man" positions, he would be employed there today. Riddle Depo. 57-58.

The problem with Defendant's argument is that

Plaintiff never turned down the "yard hostler" position. Pl. Aff. Indeed, he thought he had the position. Pl. Depo. 4. Furthermore, a question of fact exists as to whether Defendant asserted explanation for "withdrawing" the offer is pretextual.

Defendant argues it withdrew the yard hostler position because it became concerned about safety issues since the position required DOT certification. Def's Memo. p. 9. However, evidence exists that the nature of the job would not require DOT certification; and, in fact, Plaintiff had the required DOT certification. While discussing the position with Mr. Sturgill, when rudely asked if he had a DOT card, Plaintiff presented it since by that time he had obtained a DOT vision waiver and a valid DOT card. Pl. Depo. 78-80.

The yard hostler drives trailers within the confines of the facility and hostlers are not allowed on the road, for the equipment they drive are not road licensed. Riddle Depo. 27, 40; Sturgill Depo. 31. Indeed, although DOT certification is required by Defendant, it does not have to be, for the position is designed so it can be performed within the confines of the yard. Riddle Depo. 40-41. Thus, a question of fact exists as to whether DOT certification was a requirement and as to whether safety was the motivating concern.

Defendant claims it withdrew the yard hostler offer after Plaintiff did not accept it, implying Plaintiff delayed or was partly responsible for not getting the position. However, evidence exists that Plaintiff did all that was asked of him to assist in getting the position. He called Mr. Riddle; he talked to Mr. Sturgill; he went to the Portland distribution center; he waited there and presented his DOT card when asked for it; and, he took the papers given him home to them and wait for Defendant's call. Pl. Depo. 77-81; Ex. 41. Although Plaintiff went home, he was never called and never given an explanation as to why he did not get the job. Pl. Depo. 5, 81.

Additional evidence of pretext is that Mr. Riddle was unaware the offer had been withdrawn and had been told Plaintiff rejected it. Riddle Depo. 29, 55.

Regarding the second job discussed with Plaintiff, "tire man," Plaintiff rightfully rejected that offer because he had no experience doing that job, it paid substantially less per hour ($8 - $9 per hour, which is $5 - $6 less than what he had been making) and he did not satisfy an experience requirement. Pl. Depo. 85-87, 101. For a reassignment to be a reasonable accommodation, it needs to be "to an equivalent position in terms of pay, status, etc." 29 C.F.R. §1630, App. §1630(2)(o).

As to other job "offers," there is a question of fact as to whether Defendant considered Plaintiff for either a warehouse position or a dispatcher position. Defendant argues it encouraged Plaintiff to apply for a warehouse position, but he failed to pass a qualifying test. However, there is also evidence that other jobs that became available, including warehouse and dispatcher positions, were not discussed with Plaintiff. Riddle Depo. 22, 23; Cooper Depo. 5, 7.

Ordinarily, the reasonableness of an accommodation is an issue for the jury. Schmidt, supra, 864 F.Supp. at 997. Here, evidence has been adduced which raises a question of fact as to whether the other positions discussed with Plaintiff, but never given him, constituted a reasonable accommodation.

(d) Defendant Should Have Accepted Plaintiff's DOT Vision Waiver And Is Not Excused From Making A Reassignment.

Defendant argues that under the reasonable accommodation requirement there would be no requirement

to accept Plaintiff's waiver "[a]nd, as a matter of law, there was no duty to consider Plaintiff for other positions if he did not ask for any accommodation" other than acceptance of his DOT waiver. Def's Memo. at 9. Defendant's position is simply contrary to the law.

The ADA imposes on an employer an affirmative duty to make a reasonable accommodation for its employees' physical impairments. See 29 C.F.R. §1630, App. §1630.2(o); Braun v. American International Health, 315 Or. 460, 470, 846 P.2d 1151 (1993) (interpreting Oregon disability discrimination law, which is also patterned on the Rehabilitation Act, and citing 41 C.F.R. §60-741.6(d) (1992)). Likewise, reassignment is a potentially reasonable accommodation, although in general it "should only be considered when accommodation within the individual's current position would pose an undue hardship. 29 C.F.R. §1630, App., §1630.2(o). Thus, Defendant had an affirmative duty to look for a means to accommodate Plaintiff in his truck driver position and if that proved to be an undue hardship, to consider reassignment.

In the present case, there is an additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodations in that new position. Here Plaintiff was an injured worker. Pl. Depo. 36-37. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420. Plaintiff was released unconditionally to work on November 3, 1992. Pl. Depo. 91, 252; Ex. 29. However, instead of returning Plaintiff to work, Defendant sent him to its doctor for an examination, which revealed he had 20/200 vision in his left eye and needed a DOT vision waiver. Pl. Depo. 92, 94, 95, Ex. 17. Thus, at the time Defendant learned of Plaintiff's physical disability that required

reasonable accommodation, it also had a legal obligation to return him to his former position or a suitable alternative. Since Defendant was subject to both legal obligations at the same time, it had a legal obligation to make reasonable accommodation so Plaintiff could return to his job as a truck driver or to offer him a suitable alternative position with reasonable accommodation of his impairment in the alternative position.

Here, there is evidence that Defendant's personnel manager did not know of any undue hardship to Defendant that would have existed by accepting a vision waiver. Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Sturgill Depo. 37. In the absence of any undue hardship and of an individualized assessment of the safety risks, Defendant could not avoid its reasonable accommodation requirement by simply refusing to accept the waiver.

Furthermore, Defendant cannot avoid both obligations by simply asserting there was no requirement to accept the waiver and since Plaintiff did not ask for any other accommodation, no requirement to offer any reassignment. Acceptance of that position would gut disability discrimination law. This is especially true since the waiver Defendant refused to accept was developed to help satisfy the requirements of the ADA and Defendant never conducted an individualized assessment of Plaintiff to determine if he could safely drive a truck with his vision impairment.

Defendant is not entitled to judgment as a matter of law.

III.
CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment on Plaintiff's ADA claim should be

denied.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
SCOTT N. HUNT, OSB #92343

Attorneys for Plaintiff

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PLAINTIFF'S CONCISE STATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to Local Rule 220-9, Plaintiff submits this statement of material facts in dispute:

1. Whether Plaintiff had a safe driving record, without being involved in an accident in which he was at fault and was considered to be a safe driver by Defendant and not a safety hazard. Pl. Depo. 150-151, 153-57, 159-61, 165, 234-235, 280-281; Sturgill Depo. 32, 38, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 3; Ex. 20.

2. Whether Plaintiff had a record of having driven safely for Defendant with his vision impairment, amblyopia, which he has had since birth. See citations to Plaintiff's Concise Fact Number 1; Pl. Depo. 42-43, 46; Sturgill Depo. 34-35, 36; Ex. 22; Ex. 24; Aff. of Beatrice Michel.

3. Whether Plaintiff who has a physical impairment of amblyopia is otherwise qualified for the position of truck driver. See citations to Plaintiff's Concise Fact Number 2; Pl. Depo. 95; Riddle Depo. 11-13; Sturgill Depo 24, 32, 52, 57; Ex. 17; Ex. 34; Ex. 35; Ex. 43.

4. Whether Plaintiff was an injured worker entitled to reinstatement rights and as a qualified individual with a disability entitled to reasonable accommodation in his former position or a suitable alternative position. Pl. Depo. 36-37, 91, 92, 94, 95, 252; Ex. 17; Ex. 29.

5. Whether Defendant's acceptance of Plaintiff's DOT vision waiver would have constituted reasonable accommodation, and if so, whether there was a safety risk or an undue hardship excusing Defendant's non-acceptance of Plaintiff's DOT vision waiver. See citations to Plaintiff's Concise Fact Number 3 and 4; Pl. Depo. 69-70, 75; Sturgill Depo. 9, 10, 20, 22, 24, 25, 37, 56; Riddle Depo. 13, 15-18;

31, 43; Norris Depo. 6-10, 24, 32; Ex. 25; Ex. 26; Ex. 29; Ex. 32; Ex. 34; Ex. 36; Ex. 37; Ex. 39; Ex. 40.

6. Whether there was an individualized assessment of Plaintiff's potential safety risk and of any reasonable accommodation to alleviate that risk. See specific citations listed under Plaintiff's Concise Fact Number 5; Sturgill Depo. 22, 23, 30; Riddle Depo. 9, 10, 11, 22, 24.

7. Whether Defendant's conduct regarding reassignment of Plaintiff constituted a reasonable accommodation. Pl. Aff.; Pl. Depo. 4-5, 77-81, 85-87, 101; Sturgill Depo. 22, 23, 30, 31; Riddle Depo. 27, 40, 42-43; Riddle Depo. 9, 10, 11, 22, 23, 24, 55; Cooper Depo. 5, 7; Ex. 41.

8. Whether Defendant's explanation for why the truck hostler job was withdrawn is pretextual. See specific citations under Plaintiff's Concise Fact Number 5, 6, and 7; Pl. Aff.; Pl. Depo. 262-64; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 52, 57, 58; Riddle Depo. 15, 16-18, 29, 57-58; Norris Depo. 9-10, 24, 34; Ex. 1; Ex. 16; Ex. 21; Ex. 22; Ex. 23; Ex. 24, Ex. 43; Ex. 47; Ex. 48; Aff. of Beatrice Michel; citations to Plaintiff's Concise Fact Number 3.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
SCOTT N. HUNT, OSB #92343

Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF PLAINTIFF

I, HALLIE KIRKINGBURG, being first duly sworn, depose and say:

1. I am the Plaintiff herein.

2. The vision in my left eye has always been the same. It was not deteriorating in the 1990-1992 time period.

3. That vision does not interfere with my ability to drive a truck.

4. I never turned down the yard hostler position.

DATED this 26th day of September, 1995.

s/ Hallie Kirkingburg
HALLIE KIRKINGBURG, Plaintiff

SUBSCRIBED AND SWORN TO before me this 26 day of September, 1995.

s/ Wanda F. Kinkade
Notary Public of Oregon
My Commission Expires: 12-15-96

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn, depose and say:

1. I am Plaintiff's attorney.

2. Attached are true and correct copies of the deposition excerpts and deposition exhibits referenced in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment.

DATED this 29th day of September, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorney for Plaintiff

SUBSCRIBED AND SWORN TO before me this _____ day of September, 1995.

s/ Cathy A. Blanc
Notary Public for Oregon
My Commission Expires: 4-24-99

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF BEATRICE MICHEL, O.D.

I, BEATRICE MICHEL, O.D., being first duly sworn, depose and say:

1. I am a doctor of optometry and am Plaintiff's treating doctor of optometry.

2. I am aware that Mr. Kirkingburg was a truck driver for Albertson's in 1992, and am generally familiar with the duties of that position.

3. The attached, Ex. 24, is true and correct. Mr. Kirkingburg's vision was 20/200 in both 1991 and 1992 when I saw him. His condition was stable and had not worsened in the years I had seen him at the Tillamook Vision Center.

DATED this 26 day of September, 1995.

s/ Beatrice Michel
BEATRICE MICHEL, O.D.

SUBSCRIBED AND SWORN TO before me this 26 day of September, 1995.

s/ Cheryl D. Huff
Notary Public of Oregon
My Commission Expires: 07-09-99

(Certificate of Service omitted in printing)

EXHIBIT 24

Tillamook Vision Center
Eric Halperin, O.D.
Beatrice Halperin Michel, O.D.

November 9, 1992

To Whom It May Concern:

RE: KIRKINGBURG, Hallie (SS# 270-34-2921)

Mr. Kirkingburg returned to my office today for a vision examination to provide the information needed for his vision waiver. I last saw Mr. Kirkingburg January 24, 1991 for a comprehensive vision examination.

At both visits, Mr. Kirkingburg's visual acuities with spectacle correction were 20/20 right eye and 20/200 left eye. His current glasses provided his best spectacle correction. Posterior and anterior ocular health was within normal limits for both eyes.

The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. In Mr. Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). Amblyopia is said to exist if the vision is 20/30 or worse with best correction.

Mr. Kirkingburg has had amblyopia in the left eye since childhood. Mr. Kirkingburg's visual condition is stable and has not worsened since his last vision examination and is not expected to change in the future.

As a licensed doctor of optometry, my opinion is that Mr.

Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive.

If further information or clarification is necessary please contact me by phone to facilitate resolution of this matter.

Sincerely,

s/ Beatrice Michel

Beatrice Michel, O.D.

102 Stillwell • Tillamook • Oregon • 97141 • (503) 842-5568

(Caption omitted in printing)

MOTION FOR LEAVE TO FILE AN AMENDED MOTION FOR SUMMARY JUDGMENT

Pursuant to FRCP 15(a) and Local Rule 120-2, Defendant Albertsons respectfully requests that this Court allow it to file an Amended Motion for Summary Judgment and Memorandum in Support to correct certain typographical and clerical errors. A copy of the Amended Motion for Summary Judgment is attached hereto as Exhibit 1.

Counsel for plaintiff has been notified regarding this motion and has no objection thereto.

The Court has verbally granted this motion. Therefore, the original Amended Motion for Summary Judgment and Memorandum in Support is being filed simultaneously herewith.

Dated this 2nd day of October, 1995.

Respectfully submitted,

CORBETT GORDON & ASSOCIATES
s/ Corbett Gordon
By: Corbett Gordon, OSB #82009
Of Attorneys for Defendant

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(Caption omitted in printing)

AMENDED MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Albertsons, Inc. moves the Court for summary judgment in its favor on the Plaintiff's claim. In support of this motion, Defendant relies upon its Memorandum in Support of Defendant's Motion for Summary Judgment, the Plaintiff's deposition testimony (attached to the Affidavit of Michael V. Tom as Exhibit A); the deposition testimony of Theodore Sturgill, Charles Norris, and Frank Riddle (attached as Exhibits B, C, D, respectively to Affidavit of Michael V. Tom); Affidavit of Scott Jardine, Affidavit of Dona Pike King, Affidavit of Tammy Polk, and Affidavit of Vada Winn and attached Exhibits filed simultaneously herewith. The original copies of the Affidavit of Dona Pike King was previously filed with this Court with Defendant Albertsons' original Motion for Summary Judgment and the Affidavit of Diana Saucedo has been withdrawn from this Amended Motion for Summary Judgment.

The court has verbally granted Defendant Albertsons leave to file this Amended Motion and Memorandum in Support.

DATED this 2nd day of October, 1995.

Corbett Gordon & Associates

s/ Corbett Gordon
Corbett Gordon, OSB #82009
Attorneys for Defendant

(Certificate of Service omitted in printing)

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MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Hallie Kirkingburg brought this action against Defendant Albertsons, Inc. ("Albertsons") pursuant to the Americans with Disabilities Act, 29 U.S.C. §12110 et. seq. Plaintiff applied for and was hired as an over-the-road truck driver for Albertsons, working out of Albertsons' warehouse in Portland, Oregon. After approximately one year driving for Albertsons, Plaintiff fell out of his parked truck onto his head. He spent approximately one year recovering from the resulting head injury.

Upon Plaintiff's release to return to work following the compensable injury, Albertsons subjected Plaintiff to a physical examination. Albertsons discovered that Plaintiff did not meet the U.S. Department of Transportation ("DOT") vision requirements. As such, Albertsons regarded Plaintiff as unable to perform the essential function of his job with or without reasonable accommodation.

Plaintiff alleges that he was denied reasonable accommodation and was discriminated against by Albertsons in one or more of the following particulars: 1) Albertsons did not wait a reasonable period of time to allow Plaintiff to obtain a vision waiver; 2) Albertsons would not allow Plaintiff to return to work as a driver even with a vision waiver; and/or 3) Albertsons failed and refused to reasonably accommodate Plaintiff by reassigning Plaintiff to other suitable work. Plaintiff states that his visual acuity is 20/200 in his left eye and alleges that Albertsons regarded Plaintiff as having a physical impairment on this account.

Albertsons moves for summary judgment in its favor on the ground that Mr. Kirkingburg was not "otherwise

qualified" to perform the job of truck driver with or without reasonable accommodation.

II. STATEMENT OF FACTS[1]

Plaintiff was hired as a truck driver on August 21, 1990 at the Portland Distribution Center for Albertsons (Exhibit 6 to Kirkingburg Deposition). Plaintiff's employment was terminated on November 20, 1992 by Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris (Exhibit 9 to Kirkingburg Deposition, at pp. 1-2). Dr. Douglas Eubanks, D.O., determined that the Plaintiff did not meet the minimum vision requirements under the DOT standards on November 6, 1992 (Exhibit 31 to Kirkingburg Deposition, at p. 2). The termination action was memorialized in a writing, which stated Mr. Kirkingburg failed the DOT physical of November 6, 1992 (Exhibit 9 to Kirkingburg Deposition, at p. 2).

While Plaintiff was an employee of Albertsons, he was DOT certified twice by different medical examiners. Plaintiff's medical examination dated August 18, 1990, showed that the Plaintiff had 20/25 vision in the right eye and 20/70 in the left eye, and the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 C.F.R. §391.41-391.49 (Exhibit 31 to Kirkingburg Deposition). Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had 20/25 vision in the right eye and 20/100 in the left eye, and the medical examiner certified that Plaintiff again met the requirements

[1] Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts and exhibits from depositions as follows: Exhibit A - Kirkingburg deposition and exhibits thereto; Exhibit B - Sturgill deposition and exhibits thereto; Exhibit C - Norris and exhibits thereto; Exhibit D - Riddle deposition. Albertsons also files herewith the Affidavits of Dona Pike King, Scott Jardine, Tammy Polk and Vada Winn.

under the Motor Carrier Safety Regulations 49 C.F.R. §391.41-391.49. (Exhibit 31 to Kirkingburg Deposition, at p. 4.) Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has always been that way (Kirkingburg Deposition at 43, 95, 103-04, 275, 287). Historically, Albertsons has deferred to the medical conclusions of its examining physicians, as evidenced by their completion of the DOT certification cards (Affidavit of Jardine; Sturgill Deposition at 24, 34).

Albertsons' company policy states that all drivers are to be recertified when they are returning from a long term injury (Sturgill Deposition at 49, 52). When Plaintiff returned from an approximately one year long absence due to a compensable injury, he was asked to recertify with a physical examination from the Eubanks Clinic on November 6, 1992 (Sturgill Deposition at 49; Riddle Deposition at 30).

At all times, Plaintiff insisted on returning to work as a driver (Norris Deposition at 17-18). The only accommodation he suggested was that Albertsons should accept a vision waiver from the DOT (Affidavit of King). Albertsons has never accepted DOT waivers (Affidavit of King; Affidavit of Jardine). Albertsons' consistent policy has been only to employ drivers who met the minimum DOT standards (Affidavit of King; Affidavit of Jardine; Riddle Deposition at 11-13, 60).

Plaintiff filed a grievance with his Union, Teamsters Local 305, which resulted in a conference board denial of reinstatement (Affidavit of Winn). While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider other jobs for Plaintiff (Affidavit of King). Plaintiff admits he was offered the position of yard hostler (moving trailers) at the Distribution Center (Kirkingburg Deposition at 77) and the position of Tire Man (Kirkingburg Deposition at 84-85). The position of yard hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became concerned that the position required DOT

certification (Riddle Deposition at 55). Plaintiff refused the tire mechanic position (Kirkingburg Deposition at 85-87; Norris Deposition at 18).

The decision to terminate Plaintiff from his job as a driver was made by Frank Riddle, the General Manager of the Distribution Center, and corporate personnel (Riddle Deposition at 11-12). The termination was based on a review of Plaintiff's DOT file, which established that Plaintiff did not meet the DOT minimum requirements as established in the DOT manual (Riddle Deposition at 11-12). Albertsons did not accept waivers from DOT minimum requirements because Albertsons had concern for the safe operation of its vehicles (Riddle Deposition at 13, 60; Affidavit of Jardine). Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff because he could not pass the minimum DOT requirements (Sturgill Deposition at 22-24).

Albertsons has both a policy and a consistent practice of not accepting any DOT waivers (Affidavit of Jardine; Riddle Deposition at 47-48). Albertsons has always considered excellent visual acuity to be an essential function of the job of truck driver (Affidavit of Jardine; Affidavit of King).

III. **DISCUSSION**

1. **Elements of a prima facie case under the Americans with Disabilities Act.**

The Americans with Disabilities Act states that no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). To establish a prima facie ADA case, the Plaintiff must show: he is disabled (includes being regarded as disabled under 29

C.F.R. §1630.2(3)) within the meaning of the ADA; he is qualified, with or without reasonable accommodation; he is able to perform the essential functions of the job; and that the employer terminated him because of his disability. Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1386 (1994) (this is a Rehabilitation Act case. The ADA defines a disability in substantially the same terms as the Rehabilitation Act defines an individual with "handicaps", now an individual with a "disability". Chandler at 1391.) ; Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (Rehabilitation Act case).

2. **As a matter of law, Plaintiff is not an otherwise qualified individual with a disability under the Americans with Disabilities Act.**

Under the Americans with Disabilities Act of 1990, the general rule against discrimination in employment states that no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regards to discharge or other terms, conditions, and privileges of employment. 42 U.S.C. §12112(a). The term "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. 42 U.S.C. §12111(8) (emphasis added). Consideration is to be given to the employer's judgment as to what functions of a job are essential, which include employers' written job descriptions, that are considered evidence of the essential functions of the job. 42 U.S.C. §12111(8). (See Exhibit 2 to Riddle Deposition, at p. 3, which states Albertsons' drivers are required to comply with all DOT, Interstate Commerce Commission and Company safety rules). Albertsons considers the DOT minimum requirements for interstate truck driving an essential requirement to perform the function of

interstate driving (Affidavit of Jardine; Affidavit of King). When Plaintiff was terminated, he did not qualify to drive under the DOT minimum vision requirements and thus could not perform the function of driving commercial over-the-road trucks. Although Plaintiff subsequently acquired a waiver from the vision requirements, Albertsons is under no legal obligation to accept waivers. Upon returning to work from a compensable injury, the Plaintiff was unable to pass the medical examination that would qualify him to resume driving interstate trucks (Exhibit 31 to Kirkingburg Deposition, at p. 3). Dr. Douglas Eubanks found, on November 6, 1992, that Plaintiff did not meet the DOT requirements. Thus, the Plaintiff was not otherwise qualified to perform the essential function of his position as a commercial interstate truck driver.

The issue of whether one is "otherwise qualified" is explained in Chandler v. City of Dallas, 2 F.3d 1385, 1390 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 1386 (1994) and Etheridge v. State of Alabama, 860 F.Supp. 808 (M.D. Ala. 1994). In Chandler, the Fifth Circuit applies a two part inquiry to determine whether an individual is "otherwise qualified" for a given job under the Rehabilitation Act of 1973[2] . It is noteworthy that the burden lies with the plaintiff to show that he is otherwise qualified. Chandler at 1394. The first inquiry is whether the individual could perform the essential functions of the job. Id. at 1393. Under Etheridge (ADA claim), the Alabama District Court required the individual satisfy the requisite skill, experience, education and other job-related requirements of the employment position. Etheridge at 818 (citing 29 C.F.R. §1630.2(m)). Under 29 C.F.R. §1630.2(n), "essential functions" are defined as the fundamental job duties and

[2] Congress intended that the case law established under the Rehabilitation Act be used in deciding ADA cases. 42 U.S.C. §12117(b).

those that an employee must be able to perform. Etheridge at 816. Albertsons has considered good vision and DOT qualifications as essential for driving trucks (Affidavit of Jardine). The functions may be essential because the reason the position exists is to perform that function. 29 C.F.R. §1630.2(n)(2)(I).

Plaintiff's medical examinations reveal that he never qualified under the DOT requirements[3] to drive a commercial vehicle, although various examiners were "certifying" him as "qualified" (Exhibit 31 to Kirkingburg Deposition, at pp. 1, 3-4). Plaintiff's vision condition became an issue when, on November 6, 1992, Dr. Douglas Eubanks brought to Albertsons' attention the fact that the Plaintiff was not qualified under the DOT vision requirements because the visual acuity in his left eye was 20/200. As the examining physician, Dr. Douglas Eubanks found that the Plaintiff did not meet the Motor Carrier Safety Regulations. (Exhibit 31 to Kirkingburg Deposition, at p. 3).

If the Plaintiff satisfies the first inquiry, the Court should make a second inquiry to determine whether any reasonable accommodation can be made by the employer which would enable the employee to perform the functions of the job. Chandler at 1394 (citing Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991); Etheridge at 818. The Fifth Circuit echoes a United States Supreme Court decision when it states that if a reasonable accommodation will not eliminate a significant safety risk, a handicapped person is not otherwise qualified. Chandler at 1395 (citing School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)). The Fifth Circuit has held as a matter of law that a driver with insulin dependent diabetes or with vision

[3] Of relevance, 49 C.F.R. §391.41(10) requires the individual have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses.

impaired to the extent discussed in 49 C.F.R. §391.41[4] presents a genuine substantial risk that he could injure himself or others. Chandler at 1395. The Fifth Circuit echoes the sentiment expressed in an earlier unpublished opinion, "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." Chandler at 1395 (citing Collier v. City of Dallas, No. 86-1010, slip op. at 3 (5th Cir. 1986) (unpublished)).

For purposes of this Motion, even if Albertsons conceded that Plaintiff were an "otherwise qualified" individual with a disability, there are no practical means to accommodate the Plaintiff to allow him to return to a commercial truck driver's position. Putting an interstate truck driver with a left eye vision of 20/200 would risk injury to the Plaintiff, co-workers, and the public. Under Schmidt v. Safeway Inc., 864 F.Supp. 991, 998 (D. Or. 1994, Panner), an employer is not required to place an otherwise qualified individual with a disability in a position that poses an inherent risk of injury to the employee, co-workers, or public. In Chandler, the court stated that if a reasonable accommodation would not eliminate a significant safety risk, a handicapped person is not otherwise qualified. Chandler at 1395 (citing School Board of Nassau County, Florida v. Arline, 480 U.S. 273 (1987)).

Albertsons, in fact, took steps to accommodate Plaintiff by offering him other positions of employment as a yard hostler and a tire man. (Kirkingburg Deposition at 77, 84-85). Plaintiff did not accept the position of yard hostler and it was withdrawn when Albertsons became concerned

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[4]49 C.F.R. §391.41(10) requires that a person have distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses. Plaintiff does not so qualify (Exhibit 31 to Kirkingburg Deposition, at p. 2)

because the position required DOT certification (Riddle Deposition at 55). Plaintiff refused the tire mechanic position. (Norris Deposition at 18; Kirkingburg Deposition at 87). On August 25, 1995, Plaintiff applied for a warehouse job. (Affidavit of Polk). Albertsons through WorkForce Dynamics, Inc. encouraged Plaintiff to apply for a warehouse position on September 28, 1994 (Exhibit 40 to Kirkingburg Deposition). Plaintiff interviewed for the position on September 14, 1995, but did not qualify for the position because he could not pass the ergonomics test administered on September 25, 1995. (Affidavit of Polk). The ergonomics test is a validated test which assesses the physical skills and abilities of an applicant to determine if the individual is able to perform the essential functions of the warehouse job. (Affidavit of Polk).

For purposes of this Motion, even if Albertsons conceded that Plaintiff was an otherwise qualified individual with a disability, and that Albertsons could reasonably accommodate him, there would be no requirement to accept his DOT waiver and place him in a driving position because he would pose a significant threat and liability as an over-the-road driver. And, as a matter of law, there was no duty to consider Plaintiff for other positions if he did not ask for any accommodations except to insist that Albertsons waive the minimum driving requirements.

In the present case, Plaintiff has failed to present any evidence that he was otherwise qualified for the position of interstate truck driver. Plaintiff was not able to perform the essential functions of the position because he did not meet DOT minimum requirements at the time of his termination. As a result he was not "otherwise qualified", with or without reasonable accommodation. An employer is not required to accept an accommodation which is not safe. Even if Plaintiff were "otherwise qualified," there were no reasonable accommodations that would allow him to return safely to his position as a driver. When Albertsons attempted to

accommodate Plaintiff by offering a position as a tire mechanic, Plaintiff refused the offer. Albertsons is entitled to summary judgment as a matter of law, and this Court should grant summary judgment in Albertsons' favor on this claim.

DATED this 2nd day of October, 1995.

Respectfully submitted,
CORBETT GORDON & ASSOCIATES
s/ Corbett Gordon
By: Corbett Gordon, OSB #82009
Attorneys for the Defendant

(Certificate of Service omitted in printing)

(Caption omitted in printing)

CONCISE STATEMENT OF FACTS

STATEMENT OF FACTS[1]

1. Plaintiff was hired as a truck driver on August 21, 1990 at the Portland Distribution Center for Albertsons (Exhibit 6 to Kirkingburg Deposition).

2. Plaintiff's employment was terminated on November 20, 1992 by Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris (Exhibit 9 to Kirkingburg Deposition, at pp. 1-2). Dr. Douglas Eubanks, D.O., determined that the Plaintiff did not meet the minimum vision requirements under the DOT standards on November 6, 1992 (Exhibit 31 to Kirkingburg Deposition, at p. 2). The termination action was memorialized in a writing, which stated Mr. Kirkingburg failed the DOT physical of November 6, 1992 (Exhibit 9 to Kirkingburg Deposition, at p. 2).

4. While Plaintiff was an employee of Albertsons, he was DOT certified twice by different medical examiners. Plaintiff's medical examination dated August 18, 1990, showed that the Plaintiff had 20/25 vision in the right eye and 20/70 in the left eye, and the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 C.F.R. §391.41-391.49 (Exhibit 31 to Kirkingburg Deposition). Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had 20/25 vision in the right eye and 20/100 in the left eye, and

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[1] Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts and exhibits from depositions as follows: Exhibit A - Kirkingburg deposition and exhibits thereto; Exhibit B - Sturgill deposition and exhibits thereto; Exhibit C - Norris and exhibits thereto; Exhibit D - Riddle deposition. Albertsons also files herewith the Affidavits of Dona Pike King, Scott Jardine; Vada Winn and Tammy Polk.

the medical examiner certified that Plaintiff again met the requirements under the Motor Carrier Safety Regulations 49 C.F.R. §391.41-391.49. (Exhibit 31 to Kirkingburg Deposition, at p. 4.) Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has always been that way (Kirkingburg Deposition at 43, 95, 103-04, 275, 287). Historically, Albertsons has deferred to the medical conclusions of its examining physicians, as evidenced by their completion of the DOT certification cards (Affidavit of Jardine; Sturgill Deposition at 24, 34).

5. Albertsons' company policy states that all drivers are to be recertified when they are returning from a long term injury (Sturgill Deposition at 49, 52).

6. When Plaintiff returned from an approximately one year long absence due to a compensable injury, he was asked to recertify with a physical examination from the Eubanks Clinic on November 6, 1992 (Sturgill Deposition at 49; Riddle Deposition at 30).

7. At all times, Plaintiff insisted on returning to work as a driver (Norris Deposition at 17-18).

8. The only accommodation he suggested was that Albertsons should accept a vision waiver from the DOT (Affidavit of King).

9. Albertsons has never accepted DOT waivers (Affidavit of King; Affidavit of Jardine). Albertsons' consistent policy has been only to employ drivers who met the minimum DOT standards (Affidavit of King; Affidavit of Jardine; Riddle Deposition at 11-13, 60).

10. Plaintiff filed a grievance with his Union, Teamsters Local 305, which resulted in a conference board denial of reinstatement (Affidavit of Winn).

11. While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider other jobs for Plaintiff (Affidavit of King). Plaintiff admits he was offered the position of yard hostler (moving trailers) at the Distribution Center (Kirkingburg Deposition at 77) and the

position of Tire Man (Kirkingburg Deposition at 84-85). The position of yard hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became concerned that the position required DOT certification (Riddle Deposition at 55).

12. Plaintiff refused the tire mechanic position (Kirkingburg Deposition at 85-87; Norris Deposition at 18).

13. The decision to terminate Plaintiff from his job as a driver was made by Frank Riddle, the General Manager of the Distribution Center, and corporate personnel (Riddle Deposition at 11-12). The termination was based on a review of Plaintiff's DOT file, which established that Plaintiff did not meet the DOT minimum requirements as established in the DOT manual (Riddle Deposition at 11-12). Albertsons did not accept waivers from DOT minimum requirements because Albertsons had concern for the safe operation of its vehicles (Riddle Deposition at 13, 60; Affidavit of Jardine). Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff because he could not pass the minimum DOT requirements (Sturgill Deposition at 22-24).

14. Albertsons has both a policy and a consistent practice of not accepting any DOT waivers (Affidavit of Jardine; Riddle Deposition at 47-48). Albertsons has always considered excellent visual acuity to be an essential function of the job of truck driver (Affidavit of Jardine; Affidavit of King).

DATED this 2nd day of October, 1995.

Respectfully submitted,
CORBETT GORDON & ASSOCIATES
s/ Corbett Gordon
By: Corbett Gordon, OSB #82009
Attorneys for the Defendant

(Certificate of Service Omitted from Printing)

(Caption omitted in printing)

AFFIDAVIT OF MICHAEL V. TOM

I, Michael V. Tom, being first duly sworn, depose and say:

1. I am an associate with the law firm Corbett Gordon & Associates and I am one of the attorneys representing defendant Albertsons in this matter.

2. Corbett Gordon took the deposition of plaintiff, Hallie Kirkingburg in this matter on August 1, 1995 and August 22, 1995. I have attached true and accurate copies of excerpts from Mr. Kirkingburg's deposition transcript and Exhibits as Exhibit A.

3. Plaintiff took the deposition of Theodore Mitchell Sturgill on August 25, 1995. I have attached true and accurate copies of excerpts from Mr. Sturgill's deposition transcript as Exhibit B.

4. Plaintiff took the deposition of Charles Anthony Norris on August 25, 1995. I have attached true and accurate copies of excerpts from Mr. Norris' deposition transcript as Exhibit C.

5. Plaintiff took the deposition of Frank D. Riddle on August 29, 1995. I have attached true and accurate copies of excerpts from Mr. Riddle's deposition transcript as Exhibit D.

s/ Michael V. Tom
Michael V. Tom

THIS INSTRUMENT was acknowledged before me on this 2nd day of October, 1995.

s/ William D. Burt
Notary Public for Oregon
My Commission Expires: 9-19-97

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF DONA PIKE KING

I, Dona Pike King, being first duly sworn, depose and say:

1. I am the Labor Relations Manager for Albertsons located at 250 Parkcenter Blvd., Boise, Idaho, a position I have held since January, 1993. I make this affidavit on the basis of personal knowledge.

2. I have been employed with Albertsons since January, 1992. As long as I have been employed with Albertsons, Albertsons has considered excellent vision acuity to be an essential function of the job of truck driver.

3. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has both a policy and a consistent practice of not accepting any Department of Transportation Waivers.

4. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons consistent policy has been to employ drivers who meet or exceed the minimum Department of Transportation vision standards.

5. While Albertsons did not believe he was otherwise qualified to drive, Albertsons did consider the position of yard hostler for the Plaintiff, Mr. Hallie Kirkingburg. That position was offered to him through his Union representative on May 17, 1993. Mr. Kirkingburg was also offered the position of Tire Mechanic, which he rejected.

s/ Dona Pike King
Dona Pike King

THIS INSTRUMENT was acknowledged before me on this 15th day of September, 1995.

s/ Mary D. McCourt
Notary Public for Oregon
My Commission Expires: 7-12-98

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF TAMMY POLK

I, Tammy Polk, being first duly sworn, depose and say:

1. I am the Personnel Manager for Albertsons located at the Portland Distribution Center located at 17505 NE San Rafael, Portland, Oregon. I make this affidavit on the basis of personal knowledge.

2. I have been employed with Albertsons since July of 1992 and as Personnel Supervisor at the Portland Distribution Center since May, 1994. On September 25, 1995, I became the Personnel Manager and as such, I am the custodian of personnel records. Hallie Kirkingburg did not submit applications for employment to the Albertsons D.stribution Center in Portland, Oregon, between November 20, 1992 and August 25, 1995. Mr. Kirkingburg did apply for a warehouse position at the Distribution Center on August 25, 1995.

3. Mr. Kirkingburg was interviewed for the warehouse position on September 14, 1995. Mr. Kirkingburg was being considered for the warehouse position in the Portland Distribution Center, but did not qualify for the position as he could not pass the ergonomics test administered on September 25, 1995. The ergonomics test is a validated test which assesses the physical skills and abilities of an applicant to determine if the individual is able to

perform the essential functions of the warehouse job.

s/ Tammy E. Polk
TAMMY POLK

THIS INSTRUMENT was acknowledged before me on this 26th day of September, 1995.

s/ Lorna Dufur
Notary Public for Idaho
My Commission Expires: 1-9-97

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF SCOTT JARDINE

I, Scott Jardine, being first duly sworn, depose and say:

1. I am the Corporate Director of Transportation for Albertsons located at 250 Parkcenter Blvd., Boise, Idaho, a position I have held since December, 1992. I make this affidavit on the basis of personal knowledge.

2. I have been employed with Albertsons twice beginning in 1974. As long as I have been employed with Albertsons (approximately twenty years), Albertsons has considered excellent vision acuity to be an essential function of the job of truck driver.

3. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has had both a policy and a consistent practice of not accepting any Department of Transportation Waivers because of safety and liability concerns.

4. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons has deferred to examining physicians when they certify that drivers meet or exceed DOT standards.

5. As long as I have been employed with Albertsons, and to the best of my knowledge, Albertsons' consistent policy has been to employ drivers who meet or exceed the minimum Department of Transportation vision standards.

s/ Scott Jardin
Scott Jardine

THIS INSTRUMENT was acknowledged before me on this 15th day of September, 1995.

s/ Melisa G. Pearson
Notary Public for Idaho
My Commission Expires: 9-28-00

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA **Date of Proceeding:** 10/3/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: **Owen M. Panner**

Courtroom Deputy: **Margaret Hunt, 326-4190**

Reporter: None **Tape No:** ___

DOCKET ENTRY:

Record of order granting defendant Albertsons' motion for leave to file amended motion for summary judgment (#28).

***

cc: All counsel

DOCUMENT NO: 37
CIVIL MINUTES

(Caption omitted in printing)

PLAINTIFF'S ADDITIONAL CONCISE STATEMENT OF MATERIAL FACTS IN DISPUTE

Pursuant to Local Rule 220-9, Plaintiff submits this additional statement of material facts in dispute in response to Defendant's Concise Statement of Facts, which was filed after Plaintiff filed his Concise Statement of Material Facts in Dispute. A copy of Plaintiff's statement of facts is attached hereto as Exhibit A.

To decrease the risk of confusion, Plaintiff will number his additional Material Facts In Dispute starting with number 9, since his concise Statement of Material Facts In Dispute was numbered 1 through 8. All citations in support of these facts in dispute are to materials attached to Plaintiff's Concise Statement of Facts In Dispute.

9. Whether the DOT minimum physical requirements were part of the essential job function or DOT certification was actually an essential requirement of the job.

Compare citations to Defendant's Concise Statement of Facts No. 13 to Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Exs. 17, 34, 43; Pl. Depo. 95 (Defendant's doctor told him he needed a vision waiver); Pl. Depo. 69-70; Ex. 25; Sturgill Depo. 9, 20, 25 (decision not to accept waiver made by corporate legal).

10. Whether Defendant's consistent policy has been to employ only drivers who met the minimum DOT standards and not accept waivers or whether employing Plaintiff with his vision impairment did not raise any "red flags" or concerns to Defendant.

Compare citations to Defendant's Concise Statement of Facts Nos. 9 and 14 to Strugill Depo. 25, 26, 28, 32-33, 34-35, 36, 48, 49, 52; Pl. Depo. 42-43, 46, 262-64; Exs. 22, 23, 24, 47; Affidavit of Beatrice Michel.

11. Whether Defendant has always considered

excellent visual acuity to be an essential function of the job in question.

Compare citations to Defendant's Concise Statement of Facts No. 14 to citations to Plaintiff's Additional Facts in Dispute Nos. 9 and 10.

12. Whether Plaintiff was willing to return to work other than in his former position.

Compare citations to Defendant's Concise Statement of Facts No. 7 to Pl. Depo. 4 (thought he had yard hostler job), 5, 77, 78, 79, 80, 81; Pl. Affidavit (he never turned down the yard hostler position); Riddle Depo. 40, 41, 42-43, 55, 57-58; Sturgill Depo. 31; Ex. 41.

DATED this 11th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

DEFENDANT'S REPLY MEMORANDUM

In his opposition to defendant's Motion for Summary Judgment, plaintiff argues that material factual issues exist with regard to whether he was "otherwise qualified" for a driving position, and whether defendant made reasonable efforts to accommodate his alleged disability.[1] In effect, plaintiff's claim that he was "qualified" to drive a commercial motor vehicle amounts to an argument that defendant was legally obligated to accept plaintiff's participation in an experimental vision-waiver program as conclusive proof of his "qualification." Unfortunately for plaintiff, this argument ignores the nature and history of the Federal Highway Administration's (FHWA) waiver program, and is unsupported by any relevant authority.

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[1]Plaintiff suggests in his memorandum in opposition (page 11) that "Defendant does not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA ***." That, however, does not make the "impairment" a protected "disability" under the ADA. That law defines a "disability" as a "physical or mental impairment that substantially limits one or more of the major life activities" of an individual. 42 USC §12112(a). An impairment that prevents an individual from working only at one particular job (e.g., driving a commercial motor vehicle) is not a "disability" for ADA purposes. 29 CFR §1630.2(j)(3)(I). See , e.g., Jasany v. U.S. Postal Service, 755 F2d 1244, 1249 n. 3 (6th Cir 1985) (under federal Rehabilitation Act, "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one") ; Hallums v. Coca-Cola Bottling Co., 874 SW2d 30 (Tenn App 1993) (employee's monocular vision was not a "handicap" under state disability discrimination law, because it did not "substantially" limit a major life activity, even though it precluded him from obtaining a DOT medical certification; relying on federal Rehabilitation Act authority). Should this case go to trial, plaintiff will of course bear the burden of proving all elements of his ADA claim, including the existence of a covered "disability."

1. Plaintiff is not "qualified" because he cannot meet the established federal vision standards for commercial motor vehicle drivers.

The ADA "recognizes employers' obligations to comply with requirements of other laws that establish safety and health standards." EEOC Technical Assistance Manual, Section 4.6. As the EEOC itself has stated:

> The ADA does not override health and safety requirements established under other Federal laws. If a standard is required by another Federal law, the employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.
>
> ***For example***: An employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. ***

Id. at Section 4.6.1 (emphasis added). The vision requirements established by the DOT for operators of commercial motor vehicles include "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 CFR §391.41(b)(10). It is undisputed that plaintiff does not meet the standard set by that regulation, which has been in effect at all material times in this case.

Instead, plaintiff argues that he is qualified because he is eligible for a waiver of the standard set by 49 CFR

§391.41(b)(10) under an experimental FHWA study. What the Court must remember is that the waiver program has not revised, much less deleted, the visual acuity standards set by the applicable federal regulation. Rather, it is a mechanism by which the FHWA is attempting to determine whether and to what extent the regulation incorporating the visual acuity standard should be revised in the future. To accept plaintiff's argument that he should be considered "qualified" to drive by virtue of his eligibility to participate in this study would (wrongly) compel the employer to take part in an FHWA experiment, at the risk of harm to itself and to the traveling public. Nothing in the ADA requires an employer to become such an unwilling "guinea pig."

The history of the vision waiver program is briefly as follows: On February 28, 1992, the FHWA published an "advance notice of proposed rulemaking," inviting public comment on "the need, if any, to amend its driver qualification requirements relating to the vision standard," i.e., 49 CFR §391.41(b)(10). 57 Fed. Reg. 6793. On March 25, 1992, before the time for public comment had expired, the FHWA announced the implementation of a temporary vision waiver program for certain drivers, including those who were blind in one eye. 57 Fed. Reg. 10295. Following a storm of criticism, the agency published a third notice inviting public comment "on its intent to waive its vision requirements for drivers that meet certain conditions," and stating that "the proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the Federal vision requirements." 57 Fed. Reg. 23370 (June 3, 1992). Subsequently, the FHWA instituted the program to issue temporary waivers. 57 Fed. Reg. 31458 (July 16, 1992). The waiver program was promptly challenged by a number of insurance companies, law enforcement agencies, and public interest groups. Advocates for Highway Safety v. Federal Highway

Administration, 28 F3d 1288 (DC Cir 1994).

In the Advocates case, the federal Court of Appeals for the District of Columbia Circuit threw out the FHWA waiver program, holding that the agency had violated its mandate to grant waivers from established physical qualification standards only where it found that such waivers were "not contrary to the public interest and *** consistent with the safe operation of commercial motor vehicles." 28 F3d at 1293, citing 49 USC App. §2505(f). The court noted that the FHWA had admitted (in its final notice implementing the waiver program) that it had no empirical data "to establish a link between vision disorders and commercial motor vehicle safety," and that the waiver program itself was intended to provide this data by allowing the agency to conduct a study that would "provide the empirical data necessary to *** permit the FHWA to properly evaluate its current vision requirements *** and, if necessary, establish a new vision requirement ***." 57 Fed. Reg. at 31458. In plain English, the FHWA was proposing to use the waiver program as an experiment to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 CFR §391.41(b)(10) might be.

The appellate court pointed out that, "[s]ince their establishment in the late 1930's, the federal government's vision standards have been successively tightened" and that "[t]he current regulations 'prescribe "absolute" vision standards with virtually no possibility of a waiver.'" 28 F3d at 1293. Therefore,

> *** the vision waiver program represents a significant departure from the FHWA's prior policy, a departure the agency bears a special burden in justifying. *** [T]he agency initiated a program to issue temporary waivers to visually impaired drivers in order to procure the hard evidence needed to determine the effect of visual deficiencies on safety. Yet,

> before it may grant a waiver, the Safety Act requires the agency to "determine[] that such waiver ... is consistent with the safe operation of commercial motor vehicles. *** [I]ts determination that the waiver program will not adversely affect the safe operation of CMV's is devoid of empirical support in the record ***.

Id. at 1293-94 (emphasis added). The court concluded by vacating the FHWA's adoption of the waiver program.

Following the decision in the Advocates case, the FHWA published on October 6, 1994, a notice of its determination "to extend, for thirty days, waivers issued to certain vision-impaired drivers as part of a study instituted in July, 1992" in order to "gather information and data to determine whether there should be a change in the current vision standards for operators of commercial motor vehicles ***." 59 Fed. Reg. 50887. The agency proposed to extend this "study" to no later than March 31, 1996, subject to public comments received within the next fifteen days. Id. at 50891. This notice expressly stated that "[T]he agency *is not* accepting applications for vision waivers at this time." Id.

On November 17, 1994, the FHWA published a "Notice of Final Determination and change in research plan." 59 Fed. Reg. 59386 (emphasis added). This notice continued existing temporary waivers until March 31, 1996, subject to certain reporting and monitoring conditions for maintaining the waivers. In this notice, the agency acknowledged that its vision waiver "study as presently fashioned has some problems *** [and] that its group of waived drivers may include some subpar performers who individually may present an unacceptable risk to safety." Id. at 59388. In particular, the FHWA admitted that problems with monitoring of the study had led to underreporting of the number of fatal accidents involving drivers with vision waivers, and that in fact the rate of fatal accidents for this

group had been higher than previously believed. Id. at 59388-89. The agency also conceded that "the study, as currently designed, will not produce, by itself, sufficient evidence upon which to develop a new vision standard" to replace the current one in 49 CFR §391.41(b)(10). Id. at 59388.

In short, the FHWA waiver program does not represent (and, by the agency's own admission, will not support) a change in the established federal vision standards for commercial motor vehicle drivers. It is no more or less than an experimental study aimed at providing some data on the safety (or lack thereof) of people who do not meet the current vision standards. Whether this experiment will prove a success, a failure, or something in between is not now known and will not be known for some time. What is clear is that, as of this date and as of the date the plaintiff was terminated, the actual federal requirements for visual acuity are those set out in the existing regulation -- standards that this plaintiff admittedly does not meet.[2]

Plaintiff's argument that defendant should have made an "individualized assessment" of his visual impairment (Plaintiff's Memorandum, page 14) is incorrect. Defendant was entitled to rely on the established visual acuity standards in the FHWA's physical qualification regulations in disqualifying plaintiff. See Buck v. U.S. Dept. of Transportation, 56 F3d 1406 (DC Cir 1995) (FHWA was not

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[2]Plaintiff's reliance on Sarsycki v. United parcel Service, 862 F Supp 336 (WD Okla 1994) is misplaced. That case did not deal with vision waivers, and the court's comments on the FHWA vision waiver program, quoted in Plaintiff's Memorandum at page 13, were dicta. Moreover, the Sarsycki court apparently did not have the benefit of the District of Columbia Circuit Court's opinion in the Advocates for Highway Safety case, cited above, which invalidated the original FHWA vision-waiver program. Finally, the plaintiff there apparently had not been driving commercial motor vehicles and therefore was not technically subject to the physical qualification standards in the FHWA's regulations.

required to make individualized assessment of deaf truck drivers who did not meet established physical qualification standards in 49 CFR §391.41(b)(11)); Ward v. Skinner, 943 F2d 157 (1st Cir 1991) (FHWA was not required to make individualized assessment of driver who did not meet physical qualification standards of 49 CFR §391.41 because of history of epilepsy). That the FHWA has undertaken an experimental vision-waiver study cannot change this conclusion when the FHWA itself has not even proposed, much less implemented, any changes to the visual acuity standards in its regulations.[3]

The ADA allows employers to rely on established federal health and safety standards in setting minimum qualifications for jobs. The established federal standard for visual acuity for commercial motor vehicle operators in set out in 49 CFR §391.41(b)(10). Defendant has adopted this standard as a minimum qualification for its truck drivers. Plaintiff does not meet this standard and therefore is not

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[3]Nor is it relevant that the plaintiff had been erroneously certified in the past by a number of doctors and one nurse practictioner as physically qualified to drive under the FHWA's regulations. Evidently plaintiff was not alone in having "slipped through" the certification process, since the FHWA's October 6, 1994 notice admitted that there had been a number of drivers who "were operating, unwittingly or otherwise, in contravention of the existing interstate standard." 59 Fed. Reg. at 50888. In plaintiff's case, one of his doctors testified in deposition he had continued to certify the plaintiff as qualified to drive in DOT physicals he conducted in 1988, 1990, and 1992, knowing that the plaintiff did not meet the FHWA's visual acuity standards, because the plaintiff had been driving for some years. Deposition of Dr. Glen Sayler at 10-11, 13-15. Attached as exhibits to the Affidavit of Michael V. Tom filed herewith, Albertsons submits pertinent excerpts from depositions as follows: Exhibit A - Kirkingburg Deposition; Exhibit B - Dwiggins Deposition; Exhibit C - Norris Deposition; Exhibit D - Riddle Deposition; Exhibit E - Sayler Deposition. Clearly, the employer cannot be held responsible for this kind of deliberate "fudging," nor does it alter the fact that the plaintiff does not meet the standards currently set out in 49 CFR §391.41(b)(10).

"otherwise qualified" for the job of truck driver. In order for the Court to find that plaintiff is "qualified," the Court would have to hold that defendant is under some legal obligation to participate in the FHWA vision-waiver experiment. Plaintiff has not identified anything in the ADA that would impose such an obligation. The FHWA notice of November 17, 1994 makes it quite clear that the purpose of the waiver program is to provide some data to indicate just how safe these drivers are, and also makes it clear that previous FHWA monitoring of the drivers' performance had left much to be desired. The ADA does not mandate employer participation in such federal experiments, and certainly does not require this employer to accept the risks of liability presented by employing a driver who is legally blind in one eye.

2. Plaintiff has failed to raise a material issue of fact as to defendant's efforts to accommodate him in another job.

Even assuming for purposes of this Motion that plaintiff were an individual with a "disability" as that term is defined by the ADA, the record establishes that defendant did everything required of it in the way of "reasonable accommodation" by trying to place plaintiff in another job. Plaintiff's argument that defendant should have acco nmodated him in November 1992 (the time of his termination) by giving him a leave of absence to obtain a vision waiver (Plaintiff's Memorandum, page 15) is simply a restatement of his legally unsupported contention that the employer was obligated to join in the FHWA's vision-waiver study.

In addition, plaintiff's claim that the defendant was obligated to find another job for him after it learned that he was physically disqualified from the job he had been doing has been repeatedly rejected by the courts. See School Board of Nassau County v. Arline, 480 US 273, 289 n. 19, 107 S Ct

1123, 94 L Ed2d 307 (1987) (even under duty of reasonable accommodation imposed by the Rehabilitation Act, employers "are not required to find another job for an employee who is not qualified for the job he or she was doing"); Myers v. Hose, 50 F3d 278, 284 (4th Cir 1995) (under the ADA, "the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"); Guillot v. Garrett, 970 F2d 1320, 1327 (4th Cir 1992) ("[A]n employer is not required as a matter of reasonable accommodation to transfer or reassign an employee who is not otherwise qualified for the position he then holds"). In Buckingham v. United States, 998 F2d 735, 740 (9th Cir 1993), a Rehabilitation Act case, the Ninth Circuit was careful to note that, while the plaintiff's request for a transfer to the same job in a different location may have been a reasonable accommodation, "Buckingham is not asking for the type of job transfer that the Supreme Court has suggested [in Arline] might not be required under the Act. *** Buckingham is not asking for a different job."

Moreover, the record establishes that the defendant did offer and/or urge the plaintiff to apply for other jobs, even after he had been terminated. (Dwiggins Depo pp. 4-5; Norris Deposition at 18; Riddle Deposition at 55; Affidavit of Polk (original previously submitted with Defendant's Amended Motion for Summary Judgment)). Plaintiff argues that he did not have to accept the tire mechanic job that defendant offered him because it paid less than his former position (Plaintiff's Memorandum at page 17). Even the EEOC (which, as the cases cited above indicate, has gone well beyond the courts in suggesting that reasonable accommodation may include the offer of another job) does not take the position that a plaintiff has a "right" to the job of his choice, or to a job that is as good as or better than his old position. See EEOC, Technical Assistance Manual, Section

3.10.5 ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no positions vacant or soon to be vacant for which the employee is qualified ***"). Here plaintiff admits that he was offered and rejected the tire mechanic job. There is not dispute of fact that plaintiff was offered a job as yard hostler and that the job was withdrawn. While plaintiff admits that he was offered this job, he denies that he rejected it before it was withdrawn. He does not deny however, that he never accepted the job.

It is apparent from his own testimony that the plaintiff is not going to be happy with any job other his former one; he testified in deposition that he told Charlie Norris that he did not want the tire mechanic job, even though the defendant offered to train him, after Mr. Norris told him that the job would not eventually lead to a return to a driving position. (Kirkingburg Depo. pp. 86-87). Unfortunately, plaintiff simply does not have the visual acuity to meet the federal standards for that job, standards on which the employer is entitled to rely. While all parties can agree that it is a blessing that plaintiff did not have a major accident during the time he was driving in violation of the federal standards, that does not support a claim that the employer should be legally required to "push its luck" (and plaintiff's) by putting the plaintiff back on the road behind the wheel of a large commercial vehicle. Nor has plaintiff identified anything in the ADA that would compel the employer to put its equipment, its employees, its business, and the safety of the motoring public on the line in order to take part in a federal experiment.

For all of the foregoing reasons, defendant is entitled to judgment as a matter of law.

DATED this 13th day of October, 1995.

Corbett Gordon & Associates

s/ Michael V. Tom OSB#93440 for
Corbett Gordon
Corbett Gordon, OSB #82009
Attorney for Defendant

(Certificate of Service omitted in printing)

(Caption omitted in printing)

PLAINTIFF'S MOTION TO SUBMIT ADDITIONAL MATERIALS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court to receive as additional materials in opposition to Defendant's motion for summary judgment Attachments A and B hereto, excerpts from the EEOC Technical Assistance Manual and excerpts from the deposition of Beatrice Michel.

This motion is supported by the attached Affidavit of Richard C. Busse.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn, depose and say:

1. I am Plaintiff's attorney.
2. Attached hereto as Attachment A is a copy of excerpts from the EEOC Technical Assistance Manual.
3. Attached hereto as Attachment B is a copy of excerpts from the deposition of Beatrice Michel.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE

SUBSCRIBED AND SWORN TO before me this 18th day of October, 1995.

s/ Cathy A. Blanc
Notary Public of Oregon
My Commission Expires: 04-24-99

Attachment A

Qualification Standards and Selection Criteria

- **The Job Accommodation Network** (JAN) a free national consultant service, available through a toll-free number, helps employers make individualized accommodations.

- **ABLEDATA** a computerized database of disability related products and services, conducts customized information searches on worksite modifications, assistive devices and other accommodations.

- **The President's Committee on Employment of People with Disabilities** provides technical information including publications with practical guidance on job analysis and accommodations.

- **Governors' Committees on Employment of People with Disabilities** in each State, allied with the President's Committee, are local resources of information and technical assistance.

These and many other sources of specialized technical assistance are listed in the *Resource Directory*. The Index to the Directory will be helpful in locating specific types of assistance.

1100,140 IV. Establishing Nondiscriminatory Qualification Standards and Selection Criteria

4.1 ***Introduction***

The ADA does not prohibit an employer from establishing job-related qualification standards, including education, skills, work experience, and physical and mental standards necessary for job performance, health and safety.

The Act does not interfere with an employer's authority to establish appropriate job qualifications to hire people who can perform jobs effectively and safely, and to hire the best qualified person for a job. ADA requirements are designed to assure that people with disabilities are not excluded from jobs that they can perform.

ADA requirements apply to all selection standards and procedures, including but not limited to:

- **education and work experience requirements;**
- **physical and mental requirements;**
- **safety requirements;**
- **paper and pencil tests;**
- **physical or psychological tests;**
- **interview questions; and**
- **rating systems;**

4.2 ***Overview of Legal Obligations***

- Qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of disability must be **job-related and consistent with business necessity.**

• Even if a standard is job-related and consistent with business necessity, if it screens out an individual with a disability on the basis of disability, the employer **must consider** if the individual could meet the standard with a **reasonable accommodation.**

• An employer is not required to lower existing production standards applicable to the quality or quantity of work for a given job in considering qualifications of an individual with a disability, if these standards are uniformly applied to all applicants and employees in that job.

• If an individual with a disability cannot perform a marginal function of a job because of a disability, an employer may base a hiring decision only on the individual's ability to perform the *essential* functions of the job, with or without a reasonable accommodation.

4.3 *What is Meant by "Job-Related" and "Consistent with Business Necessity"?*

1. Job-Related

If a qualification standard, test or other selection criterion operates to screen out an individual with a disability, or a class of such individuals on the basis of disability, it must be a legitimate measure or qualification for the *specific* job it is being used for. It is not enough that it measures qualifications for a general class of jobs.

For example: A qualification standard for a secretarial job of "ability to take shorthand dictation" is not job-related if the person in the particular secretarial job actually transcribes taped dictation.

The ADA does not require that a qualification standard or selection criterion apply only to the "essential functions" of a job. A "job related" standard or

selection criterion may evaluate or measure all functions of a job and employers may continue to select and hire people who can perform all of these functions. It is only when an individual's disability prevents or impedes performance of marginal job functions that the ADA requires the employer to evaluate this individual's qualifications solely on his/her ability to perform the essential functions of the job, with or without an accommodation.

For example: An employer has a job opening for an administrative assistant. The essential functions of the job are administrative and organizational. Some occasional typing has been part of the job, but other clerical staff are available who can perform this marginal job function. There are two job applicants. One has a disability that makes typing very difficult, the other has no disability and can type. The employer may not refuse to hire the first applicant because of her inability to type, but must base a job decision on the relative ability of each applicant to perform the essential administrative and organizational job functions, with or without accommodation. The employer may not screen out the applicant with a disability because of the need to make an accommodation to perform the essential job functions. However, if the first applicant could not type for a reason *not* related to her disability (for example, if she had never learned to type) the employer would be free to select the applicant who could best perform all of the job functions.

2. Business Necessity

"Business necessity" will be interpreted under the ADA as it has been interpreted by the courts under Section 504 of the Rehabilitation Act.

Under the ADA, as

under the Rehabilitation Act:

If a test or other selection criterion excludes an individual with a disability *because of* the disability and does not relate to the *essential functions of a job,* it is not consistent with business necessity.

This standard is similar to the legal standard under Title VII of the Civil Rights Act which provides that a selection procedure which screens out a disproportionate number of persons of a particular race, sex or national origin "class" must be justified as a "business necessity." However, under the ADA the standard may be applied to an *individual* who is screened out by a selection procedure because of disability, as well as to a class of persons. It is not necessary to make statistical comparisons between a group of people with disabilities and people who are not disabled to show that a person with a disability is screened out by a selection standard.

Disabilities vary so much that it is difficult, if not impossible, to make general determinations about the effect of various standards, criteria and procedures on "people with disabilities." Often, there may be little or no statistical data to measure the impact of a procedure on any "class" of people with a particular disability compared to people without disabilities. As with other determinations under the ADA, the exclusionary effect of a selection procedure usually must be looked at in relation to a particular individual who has particular limitations caused by a disability.

Because of these differences, the federal *Uniform Guidelines of Employee Selection Procedures* that apply to selection procedures on the basis of race, sex, and national origin under Title VII of the Civil Rights Act and other Federal authorities *do not apply* under the ADA to selection procedures affecting people with disabilities.

A standard may be job-related but not justified by business necessity because it does not concern an essential function of a job.

For example: An employer may ask candidates for a clerical job if they have a driver's license, because it would be desirable to have a person in the job who could occasionally run errands or take packages to the post office in an emergency. This requirement is "job-related," but it relates to an **incidental**, not an **essential**, job junction. If it disqualifies a person who could not obtain a driver's license because of a disability, it would not be justified as a "business necessity" for purposes of the ADA.

Further, the ADA requires that even if a qualification standard or selection criterion is *job-related* and consistent with business necessity, it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation.

For example: It may be job-related and necessary for a business to require that a secretary produce letters and other document on a word processor. But it would be discriminatory to reject a person whose disability prevented manual keyboard operation, but who could meet the qualification standard using a computer assistive device, if providing this device would not impose an undue hardship.

4.4 *Establishing Job-Related Qualification Standards*

The ADA does not restrict an employer's authority to establish needed job qualifications, includ-

ing requirements related to:

- education;
- skills;
- work experience;
- licenses or certification;
- physical and mental abilities;
- health and safety; or
- other job-related requirements, such as judgment, ability to work under pressure or interpersonal skills.

Physical and Mental Qualification Standards

An employer may establish physical or mental qualifications that are necessary to perform specific jobs (for example, jobs in the transportation and construction industries; police and fire fighter jobs; security guard jobs) or to protect health and safety.

However, as with other job qualification standards, if a physical or mental qualification standard screens out an individual with a disability or a class of individuals with disabilities, the employer must be prepared to show that the standard is:

- **job-related and**
- **consistent with business necessity.**

Even if a physical or mental qualification standard is job-related and necessary for a business, if it is applied to exclude an otherwise qualified individual with a disability, the employer must consider whether there is a reasonable accommodation that would enable *this person* to meet the standard. The employer does not have to consider such accommodations in establishing a standard, but only when an otherwise qualified person with a disability requests an accommodation.

For example: An employer has a forklift operator job. The essential function of the job is mechanical operation of the forklift machinery. The job has a physical requirement of ability to lift a 70 pound weight, because the operator must be able to remove and replace the 70 pound battery which powers the forklift. This standard is job-related. However, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70 pound weight because of a disability, if other operators or employees are available to help this person remove and replace the battery.

Evaluating Physical and Mental Qualification Standards Under the ADA

Employers generally have two kinds of physical or mental standards:

1. Standards that may exclude an entire class of individuals with disabilities.

For example: No person who has epilepsy, diabetes, or a heart or back condition is eligible for a job.

2. Standards that measure a physical or mental ability needed to perform a job.

***For example*:** The person in the job must be able to lift x pounds for x hours daily, or run x miles in x minutes.

Standards that exclude an entire class of individuals with disabilities.

"Blanket" exclusions of this kind usually have been established because employers believed them to be necessary for health or safety reasons. Such standards also may be used to screen out people who an employer fears, or assumes, may cause higher medical insurance or workers' compensation costs, or may have a higher rate of absenteeism.

Employers who have such standards should review them carefully. In most cases, they will not

meet ADA requirements.

The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective *assessment of* a *particular individuals current ability* to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA. (However, the ADA recognizes employers' obligations to comply with Federal laws that mandate such exclusions in certain occupations. [See *Health and Safety Requirement of Other Federal or State Laws* below.])

The ADA requires that:

- Any determination of a direct threat to health or safety must be based on an *individualized* assessment of objective and specific evidence about a particular *individual's* present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See *Standards Necessary for Health and Safety: A "Direct Threat"* below).

For example: An employer who excludes all persons who have epilepsy from jobs that require use of dangerous machinery will be required to look at the life experience and work history of an *individual* who has epilepsy. The individual evaluation should take into account the type of job, the degree of seizure control, the type(s)

of seizures (if any), whether the person has an "aura" (warning of seizure), the person's reliability in taking prescribed anti-convulsant medication, and any side effects of such medication. Individuals who have no seizures because they regularly take prescribed medication, or who have sufficient advance warning of a seizure so that they can stop hazardous activity, would not pose a "direct threat" to safety.

Standards that measure neededphysical or mental ability to perform a job

Specific physical or mental abilities may be needed to perform certain types of jobs.

For example: Candidates for jobs such as airline pilots, policemen and firefighters may be required to meet certain physical and psychological qualifications.

In establishing physical or mental standards for such jobs, an employer does not have to show that these standards are "job related," justified by "business necessity" or that they relate only to "essential" functions of the job. However, if such a standard screens out an otherwise qualified individual with a disability, the employer must be prepared to show that the standard, as applied, *is* job-related and consistent with business necessity under the ADA. And, even if this can be shown, the employer must consider whether this individual could meet the standard with a **reasonable accommodation.**

For example: A police department that requires all its officers to be able to make forcible arrests and to perform all job functions in the department might be able to justify stringent physical requirements for all officers, if in fact they are all required to be available for any duty in an emergency.

However, if a position in a mailroom required as a qualification standard that the person in the job be able to reach high enough to place and retrieve packages from 6-foot high shelves, an employer would have to consider whether there was an accommodation that would enable a person with disability that prevented reaching that high to perform these essential functions. Possible accommodations might include lowering the shelf-height, providing a step stool or other assistive device.

Physical agility tests

An employer may give a physical agility test to determine physical qualifications necessary for certain jobs prior to making a job offer if it is simply an agility test and not a medical examination. Such a test would not be subject to the prohibition against pre-employment medical examinations *if given* to all similarly situated applicants or employees, regardless of disability. However, if an agility test screens out or tends to screen out an individual with a disability or a class of such individuals because of disability, the employer must be prepared to show that the test is job-related and consistent with business necessity and that the test or the job cannot be performed with a reasonable accommodation.

It is important to understand the distinction between physical agility tests and prohibited pre-employment medical inquiries and examinations. One difference is that agility tests do not involve medical examinations or diagnoses by a physician, while medical examinations may involve a doctor.

For example: At the pre-offer stage, a police department may conduct an agility test to measure a candidate's ability to walk, run, jump, or lift in relation to specific job duties, but it cannot require the applicant to have a medical screening before taking the agility test. Nor can it administer a medical examination before making a conditional job offer to this person.

Some employers currently may require a medical screening before administering a physical agility test to assure that the test will not harm the applicant. There are two ways that an employer can handle this problem under ADA:

- the employer can request the applicant's physician to respond to a very restricted inquiry which describes the specific agility test and asks, "Can this person safely perform this test?"

- the employer may administer the physical agility test *after* making a conditional job offer, and in this way may obtain any necessary medical information, as permitted under the ADA. (See Chapter VI.) The employer may find it more cost-efficient to administer such tests only to those candidates who have met other job qualifications.

4.5 *Standards Necessary for Health and Safety: A "Direct Threat"*

An employer may require as a qualification standard that an individual not pose a "direct threat" to the health or safety of the individual or others, if this standard is applied to all applicants for a particular job. However, an employer must meet very specific and stringent requirements under the ADA to establish that such a "direct threat" exists.

The employer must be prepared to show that there is:

- ***significant* risk of substantial harm;**
- **the *specific* risk must be identified;**
- **it must be a *current* risk, not one that is spec-**

ulative or remote;
• the assessment of risk must be based on objective medical or other factual evidence regarding a particular individual; and
• even if a genuine significant risk of substantial harm exists, the employer must consider whether the risk can be eliminated or reduced below the level of a "direct threat" by *reasonable accommodation*.

Looking at each of these requirements more closely:

1. *Significant risk of substantial harm*

An employer cannot deny an employment opportunity to an individual with a disability merely because of a slightly increased risk. The employer must be prepared to show that there is a **significant risk**, that is, **a high probability of substantial harm**, if the person were employed.

The assessment of risk *cannot be based on mere speculation*unrelated to the individual in question.

For example: An employer cannot assume that a person with cerebral palsy who has restricted manual dexterity cannot work in a laboratory because he/she will pose a risk of breaking vessels with dangerous contents. The abilities or limitations of a particular individual with cerebral palsy must be evaluated.

2. *The specific risk must be identified*

If an individual has a disability, the employer must identify the aspect of the disability that would pose a direct threat, considering the following factors:

• the **duration** of the risk.

For example: An elementary school teacher who has tuberculosis may pose a risk to the health of chil-

dren in her classroom. However, with proper medication, this person's disease would be contagious for only a two-week period. With an accommodation of two-weeks absence from the classroom, this teacher would not pose a "direct threat."

• the **nature** and **severity** of the potential harm.

For example: A person with epilepsy, who has lost consciousness during seizures within the past year, might seriously endanger her own life and the lives of others if employed as a bus driver. But this person would not pose a severe threat of harm if employed in a clerical job.

• The **likelihood** that the potential harm will occur.

For example: An employer may believe that there is a risk of employing an individual with HIV disease as a teacher. However, it is medically established that this disease can only be transmitted through sexual contact, use of infected needles, or other entry into a person's blood stream. There is little or no likelihood that employing this person as a teacher would pose a risk of transmitting this disease.

and

• the **imminence** of the potential harm.

For example: A physician's evaluation of an applicant for a heavy labor job that indicated the individual had a disc condition that might worsen in 8 or 10 years would not be sufficient indication of imminent potential harm.

If a perceived risk to heath and safety arises from the behavior of an individual with a mental or emotional disability, the employer must identify the specific behavior that would pose the "direct threat."

3. *The risk must be cur-*

rent not one that is speculative or remote

The employer must show that there is a *current* risk -- "a high probability of substantial harm" -- to health or safety based on the individual's present ability to perform the essential functions of the job. A determination that an individual would pose a "direct threat" cannot be based on speculation about *future* risk. This includes speculation that an individual's disability may become more severe. An assessment of risk cannot be based on speculation that the individual will become unable to perform a job in the future, or that this individual may cause increased health insurance or workers compensation costs, or will have e excessive absenteeism. (See *Insurance*, Chapter VII., and Workers' Compensation, Chapter IX.)

4. *The assessment of risk must be based on objective medical or other evidence related to a particular individual*

The determination that an individual applicant or employee with a disability poses a "direct threat" to health or safety must be based on objective, factual evidence related to *that individual's* present ability to safely perform the essential functions of a job. It cannot be based on unfounded assumption, fears, or stereotypes about the nature or effect of a disability or of disability generally. Nor can such a determination be based on patronizing assumptions that an individual with a disability may endanger himself or herself by performing a particular job.

For example: An employer may not exclude a person with a vision impairment from a job that requires a great deal of reading because of concern that the strain of heavy reading may further impair her sight.

The determination of a "direct threat" to health or safety must be based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence. This may include:

- **input from the individual with a disability;**
- **the experience of this individual in previous jobs;**
- **documentation from medical doctors, psychologists, rehabilitation counselors, physical or occupational therapists, or others who have expertise in the disability involved and/or direct knowledge of the individual with a disability.**

Where the psychological behavior of an employee suggests a threat to safety, **factual evidence** of this behavior also may constitute evidence of a "direct threat." An employee's violent, aggressive, destructive or threatening behavior may provide such evidence.

Employers should be careful to assure that assessments of "direct threat" to health or safety are based on current medical knowledge and other kinds of evidence listed above, rather than relying on generalized and frequently out-of-date assumptions about risk associated with certain disabilities. They should be aware that Federal contractors who have had similar disability nondiscrimination requirements under the Rehabilitation Act have had to make substantial back pay and other financial payments because they excluded individuals with disabilities who were qualified to perform their jobs, based on generalized assumptions that were not supported by evidence about the individual concerned.

Examples of Contractor Cases:

- A highly qualified expe-

rienced worker was rejected for a sheet metal job because of a company's general medical policy excluding anyone with epilepsy from this job. The company asserted that this person posed a danger to himself and to others because of the possibility that he might have a seizure on the job. However, this individual had been seizure-free for 6 years and co-workers on a previous job testified that he carefully followed his prescribed medication schedule. The company was found to have discriminated against this individual and was required to hire him, incurring large back pay and other costs.

• An applicant who was deaf in one ear was rejected for an aircraft mechanic job because the company feared that his impairment might cause a future workers' compensation claim. His previous work record gave ample evidence of his ability to perform the aircraft mechanic job. The company was found to have discriminated because it provided no evidence that this person would have been a danger to himself or to others on the job.

• An experienced carpenter was not hired because a blood pressure reading by the company doctor at the end of a physical exam was above the company's general medical standard. However, his own doctor provided evidence of much lower readings based on measurements of his blood pressure at several times during a physical exam. This doctor testified that the individual could safely perform the carpenter's job because he had only mild hypertension. Other expert medical evidence conformed that a single blood pressure reading was not sufficient to determine if a person has hypertension, that such a reading clearly was not sufficient to determine if a person could perform a particular job, and that hypertension has very

different effects on different people. In his case, it was found that there was merely a slightly elevated risk, and that a remote possibility of future injury was not sufficient to disqualify an otherwise qualified person. (Note that while it is possible that a person with mild hypertension does not have an impairment that "substantially limits a major life activity," in this case the person was excluded because he was "regarded as" having such an impairment. The employee was still required to show that this person posed a "direct threat" to safety.)

"Direct Threat" to Self

An employer may require that an individual not pose a direct threat of harm to his or her own safety or health, as well as to the health or safety of others. However, as emphasized above, such determinations must be strictly based on valid medical analyses or other objective evidence related to this individual, using the factors set out above. A determination that a person might cause harm to himself or herself *cannot* be based on stereotypes, patronizing assumptions about a person with a disability, or generalized fears about risks that might occur if an individual with a disability is placed in a certain job. Any such determination must be based on evidence of specific risk to a particular individual.

For example: An employer would not be required to hire an individual disabled by narcolepsy who frequently and unexpectedly loses consciousness to operate a power saw or other dangerous equipment, if there is no accommodation that would reduce or eliminate the risk of harm. But an advertising agency could not reject an applicant for a copywriter job who has a history or mental illness, based on a generalized fear that working in this high stress job might trigger a relapse of the individual's

mental illness. Nor could an employer reject an applicant with a visual or mobility disability because of a generalized fear of risks to this person in the event of a fire or other emergency.

5. *If there is a significant risk, reasonable accommodation must be considered*

Where there is a significant risk of substantial harm to health or safety, an employer still must consider whether there is a reasonable accommodation that would eliminate this risk or reduce the risk so that it is below the level of a "direct threat."

For example: A deaf bus mechanic was denied employment because the transit authority feared that he had a high probability of being injured by buses moving in and out of the garage. It was not clear that there was, in fact, a "high probability" of harm in this case, but the mechanic suggested an effective accommodation that enabled him to perform his job with little or no risk. He worked in a corner of the garage, facing outward, so that he could see moving buses. A co-worker was designated to alert him with a tap on the shoulder if any dangerous situation should arise.

"Direct Threat" and Accommodation in Food Handling Jobs

The ADA includes a specific application of the "direct threat" standard and the obligation for reasonable accommodation in regard to individuals who have infectious or communicable diseases that may be transmitted through the handling of food.

The law provides that the U.S. Department of Health and Human Services (HHS) must prepare and update annually a list of contagious diseases that are transmitted through the handling of food and the methods by which these diseases are transmitted.

When an individual who has one of the listed diseases applies for work or works in a job involving food handling, the employer must consider whether there is a reasonable accommodation that will eliminate the risk of transmitting the disease through handling of foods. If there is such an accommodation, and it would not impose an undue hardship, the employer must provide the accommodation.

An employer would not be required to hire a job *applicant* in such a situation if no reasonable accommodation is possible. However, an employer would be required to consider accommodating an *employee* by reassignment to a position that does not require handling of food, if such a position is available, the employee is qualified for it, and it would not pose an undue hardship.

In August 1991, the Centers for Disease Control (CDC) of the Public Health Service in HHS issued a list of infectious and communicable diseases that are transmitted through handling of food, together with information about how these diseases are transmitted. The list of diseases is brief. In conformance with established medical opinion, it does not include AIDS or the HIV virus. In issuing the list, the CDC emphasized that the greatest danger of food-transmitted illness comes from contamination of infected food-producing animals and contamination in food processing, rather than from handling of food by persons with infectious or communicable diseases. The CDC also emphasized that proper personal hygiene and sanitation in food-handling jobs were the most important measures to prevent transmission of disease.

The CDC list of diseases that are transmitted through food handling and

recommendations for preventing such transmission appears in Appendix C.

Health and Safety Requirements of Other Federal or State Laws

The ADA recognizes employers' obligations to comply with requirements of other law's that establish health and safety standards. However, the Act gives greater weight to Federal than to state or local law.

1. Federal Laws and Regulations

The ADA does not override health and safety requirements established under other Federal Laws. If a standard is required by another Federal law, a employer must comply with it and does not have to show that the standard is job related and consistent with business necessity.

For example: An employee who is being hired to drive a vehicle in interstate commerce must meet safety requirements established by the U.S. Department of Transportation. Employers also must conform to health and safety requirements of the U.S. Occupational Safety and Health Administration (OSHA).

However, an employer still has the obligation under the ADA to consider whether there is a reasonable accommodation, consistent with the standards of other Federal laws, that will prevent exclusion of qualified individuals with disabilities who can perform jobs without violating the standards of those laws.

For example: In hiring a person to drive a vehicle in interstate commerce, an employer must conform to existing Department of Transportation regulations that exclude any person with epilepsy, diabetes, and certain other conditions from such a job.

But, for example, if

DOT regulations require that a truck have 3 grab bars in specified places, and an otherwise qualified individual with a disability could perform essential job functions with the assistance of 2 additional grab bars, it would be a reasonable accommodation to add these bars, unless this would be an undue hardship.

The Department of Transportation as directed by Congress, currently is reviewing several motor vehicle standards that require "blanket" exclusions of individuals with diabetes, epilepsy and certain other disabilities.

2. State and Local Laws

The ADA does not override state or local laws designed to protect public health and safety, except where such laws conflict with ADA requirements. This means that if there is a state or local law that would exclude an individual with a disability for a particular job or profession because of a health or safety risk, the employer still must assess whether a particular individual would pose a "direct threat" to health or safety under the ADA standard. If there is such a "direct threat," the employer also must consider whether it could be eliminated or reduced below the level of a "direct threat" by reasonable accommodation. An employer may not rely on the existence of a state or local law that conflicts with ADA requirements as a defense to a charge or discrimination.

For example: A state law that required a school bus driver to have a high level of hearing in both ears without use of hearing aid was found by a court to violate Section 504 of the Rehabilitation Act, and would violate the ADA. The court found that the driver could perform his job with a hearing aid without a risk to safety.

(See further guidance on Medical Examinations and Inquiries in Chapter VI.)

(Certificate of Service omitted in printing)

(Caption omitted in printing)

MOTION TO SUPPLEMENT PLAINTIFF'S MATERIALS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the Court for an order allowing Plaintiff to supplement his materials with five (5) pages from Defendant's Driver Qualification File on Hallie Kirkingburg, which was received on October 17, 1995. Only one of those pages, page 06, contains new information, although, the others establish that Defendant's doctors were certifying Plaintiff as qualified in 1990 and 1991 despite his condition, and that Defendant had this information in its file.

This motion is supported by the attached Affidavit of Richard C. Busse.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

AFFIDAVIT OF RICHARD C. BUSSE

I, RICHARD C. BUSSE, being first duly sworn, depose and say:

1. I am Plaintiff's attorney.
2. Attached hereto is a copy of excerpts of the Defendant's Driver Qualification File on Hallie Kirkingburg

which was received on October 17, 1995.

DATED this 18th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE

SUBSCRIBED AND SWORN TO before me this 18th day of October, 1995.

s/ Cathy A. Blanc
Notary Public of Oregon
My Commission Expires: 4-24-99

(Certificate of Service omitted in printing)

ATTACHMENT

Albertsons

Albertsons
DRIVER QUALIFICATION FILE

COF 01

ATTACHMENT

FEDERAL HIGHWAY ADMINISTRATION

391.41 ... ER
391.41(b)(10)

...iver Number: VI369

Frank -

The clinic called, said Hallie had gotten a waiver from the DOT and all he needed was his card. I told them we have to sign off on the waiver for it to be effective. They sent us his card because I said we don't want him to have it. I told them to have him follow up with Bruce if he has a problem.

...ffective Date: 02-25-93

...iration Date: 02-25-96

...201558 OR

AUT...

THIS ... HAS ... PRE... OFF... E INDIVIDUAL TO WHOM IT ... AL MOTOR VEHICLE (CMV) AND ... AUTHORIZED ENFORCEMENT

This ... the c... Adm... cause ... a CMV in interstate commerce under ... dic review by the Federal Highway ... the waiver stated below will be

CON... with 49 CFR 391.43 as physically ... irement being waived by this document;

(2) Obtain a medical examiner's certificate, from a health care professional, that bears the statement "Medically unqualified unless accompanied by a Federal vision waiver;"

(3) Provide the medical examiner's certificate upon request of any legally authorized enforcement official; and

(4) Obtain and display the appropriate driver's license from your State of domicile and comply with any restrictions placed thereon regarding required use of eyeglasses, mirrors or other visual aids.

Issued by:

Thomas P Hegland

(for) E. Dean Carlson
Executive Director
Federal Highway Administration

See reverse side for reporting requirements — DOF 06

ATTACHMENT

Albertsons®

PHYSICAL EXAMINATION FORM
(MEETS DEPARTMENT OF TRANSPORTATION REQUIREMENTS)

To Be Filled in By Examining Physician (Please Print) — New Certification ☐ Recertification ☒

Driver's Name ______ Soc. Sec. No ______ Date of Birth ______ Age ______

Health History:

Yes	No		Yes	No		Yes	No	
	✓	Asthma		✓	Nervous Stomach		✓	Head or spinal injuries
	✓	Kidney Disease		✓	Rheumatic Fever		✓	Seizures, fits, convulsions, or fainting
	✓	Tuberculosis		✓	Muscular Disease		✓	Extensive confinement by illness or injury
	✓	Syphilis		✓	Psychiatric disorder		✓	Any other nervous disorder
	✓	Gonorrhea		✓	Cardiovascular disease		✓	Suffering from any other disease
	✓	Diabetes		✓	Gastrointestinal ulcer		✓	Permanent defect from illness, disease or injury

If answer to any of the above is yes, explain ______ Surgery

General appearance and development: Good ____ Fair ✓ ____ Poor ____

Vision: Both 20/25 For Distance: Right 20/ 25 Left 20/ 100
☐ Without corrective lenses ☒ With corrective lenses if worn
Evidence of disease or injury: Right ____ Left ____
Color Test ____
Horizontal field of vision: Right ____° Left ____°

Hearing: Right ear OK Left ear OK
Disease or injury ____

Audiometric test: (If audiometer is used to test hearing) Decibel loss at 500 Hz ____ at 1 000 Hz ____ at 2 000 Hz ____

Throat: ____

Thorax: Heart ____
If organic disease is present, is it fully compensated? ____
Blood pressure: Systolic 128 Diastolic 84
Pulse: Before exercise 80 Immediately after exercise 110
Lungs ____

Abdomen: Scars ____ Abnormal masses ____ Tenderness ____
Hernia: Yes ____ No ____ If so where? ____ Is truss worn? ____

Gastrointestinal: Ulceration or other disease ____

Genito-Urinary: Scars ____ Urethral Discharge ____

Reflexes: Romberg ____ Pupillary ____ Light R ____ L ____
Accommodation Right ____ Left ____
Knee jerks: Right: Normal ____ Increased ____ Absent ____ Left: Normal ____ Increased ____ Absent ____
Remarks: ____

Extremities: Upper ____ Lower ____ Spine ____

Laboratory and Other Special Findings: Urine: Spec. Gr. ____ Alb. ____ Sugar ____
Other Laboratory Data (Serology, etc.) ____
Radiological Data ____ Electrocardiograph ____

MEDICAL EXAMINER'S CERTIFICATE

I certify that I have examined

Hallie Kirkindoll(?)

...

2-5-91

X [signature]

Hallie Kirkindoll(?)
Box 542 ... TX

The following to be completed only when the visual test is conducted by a licensed optometrist.

Date of Examination

Name of Optometrist (Print)

Address of Optometrist

Signature of Optometrist

DOF 227

INSTRUCTIONS ON REVERSE SIDE

ATTACHMENT

MEDICAL EXAMINER'S CERTIFICATE

HALLIE E. KIRKINGBURG

(DRIVER'S NAME — PRINT)

8-18-90

(DATE OF EXAMINATION)

Robert Eubanks D.O.

(SIGNATURE OF DRIVER)

X Box 542 Garibaldi, OR

(ADDRESS OF DRIVER)

(SIGNATURE OF EXAMINING DOCTOR)

ATTACHMENT

Albertsons

PHYSICAL EXAMINATION FORM

(MEETS DEPARTMENT OF TRANSPORTATION REQUIREMENTS)

To Be Filled In By Examining Physician (Please Print)

New Certification ☐

Driver's Name

Recertification X

Soc. Sec. No. — Date of Birth — Age

Health History

Asthma; Kidney disease; Tuberculosis; Syphilis; Gonorrhea; Diabetes; Nervous Stomach; Rheumatic Fever; Muscular disease; Psychiatric disorder; Cardiovascular disease; Gastrointestinal ulcer; Head or spinal injuries; Seizures, fits, convulsions, or fainting; Extensive confinement by illness or injury; Any other nervous disorder; Suffering from any other disease; Permanent defect from illness, disease or injury

If answer to any of the above is yes, explain: h-7511" w-216

General appearance and development: Good X

Vision: For Distance Right 20/ 25 Left 20/ 20/70

Color Test: norm

Hearing: Right ear norm Left ear norm

Urine: Spec. Gr. 1.025

MEDICAL EXAMINER'S CERTIFICATE

HALLIE E. KIRKINGBURG

2800 S.W. 257th • TROUTDALE, OR 97060

AUG 1 8 1990

Robert Eubanks D.O.

X Box 542 Garibaldi, Oregon

8/18/90

(Date of Examination)

(Name of Optometrist)

(Address of Optometrist)

(Signature of Optometrist)

INSTRUCTIONS ON REVERSE SIDE

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA **Date of Proceeding:** 10/21/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: **Owen M. Panner**

Courtroom Deputy: **Margaret Hunt, 326-4190**

Reporter: None **Tape No:** ___

DOCKET ENTRY:

Record of order granting plaintiff's motion to supplement materials in opposition to defendant's motion for summary judgment (#44).

PLAINTIFF'S COUNSEL **DEFENDANT'S COUNSEL**

cc: All counsel

DOCUMENT NO: 46
CIVIL MINUTES

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CIVIL MINUTES

Case No.: 95-549-PA **Date of Proceeding:** 10/21/95

Case Title: Kirkingburg v. Albertson's Inc.

Presiding Judge: **Owen M. Panner**

Courtroom Deputy: **Margaret Hunt, 326-4190**

Reporter: None **Tape No:** ___

DOCKET ENTRY:

Record of order granting plaintiff's motion to submit additional materials (#45).

PLAINTIFF'S COUNSEL **DEFENDANT'S COUNSEL**

cc: All counsel

DOCUMENT NO: 47
CIVIL MINUTES

(Caption omitted in printing)

TRANSCRIPT OF SUMMARY JUDGMENT PROCEEDINGS

BEFORE THE HONORABLE OWEN M. PANNER

APPEARANCES:

FOR THE PLAINTIFF: Richard C. Busse

FOR THE DEFENDANT: Corbett Gordon
Kathleen Fields
Michael V. Tom

COURT REPORTER: Dennis R. Grube
620 S.W. Main Street
225 U.S. Courthouse
Portland, OR 97205
(503) 326-3113

(October 18, 1995)

PROCEEDINGS

THE COURT: All right. Well, it's the defendant's motion for summary judgment. I don't want you to repeat all of these nice materials that I have. But if you have any last minute strokes of wisdom, why, I would love to hear them.

MS. GORDON: Okay. With that admonition I have almost nothing to say.

THE COURT: All right. Then you can respond to anything Rich has to say if you want to say something.

MS. GORDON: Well, I do have a little. I said almost nothing. I have a little bit.

THE COURT: All right.

MS. GORDON: I think that Your Honor's decision in

Schmidt v. Safeway which we cited in our materials is particularly instructive if you look at the difference between the plaintiff in that case and the plaintiff here.

The plaintiff here has a visual impairment which is not correctable by lenses or any other means. There's no accommodation to his actual disability that can be done. And that plaintiff in the Schmidt case, as Your Honor pointed out, could with treatment overcome his active alcoholism. And you ruled that he should be allowed to have the opportunity to do that. And I just wanted to point out the difference in the disabilities in those two cases, both with driving jobs, both with applicable D.O.T. regulations.

THE COURT: Let me ask you, Corbett, about this regulation that was adopted November 17, 1994 by the Federal Highway Administration in which they provided for waivers from the requirements of the act.

MS. GORDON: Okay.

THE COURT: In other words, assuming this plaintiff has such a waiver, and I assume he does. Is that right?

MR. BUSSE: Yes.

MS. GORDON: Yes, he does.

THE COURT: The facts I think are pretty clear in this case. It seems to me it's probably almost appropriate for a legal decision either for the plaintiff or for the defendant.

As I understand it the plaintiff has a perfectly good safety record in the past, has been driving for the defendant to some extent in the past with a good record, but clearly doesn't qualify under the existing regulations because of his eyesight but does have a waiver from the administration because of his problem with one eye.

Is that the gist of it?

MR. BUSSE: That's correct, Your Honor.

THE COURT: So it seems to me that it's almost a matter of law as to whether or not the ADA requires the defendant to employ this man or whether he's not entitled to because of this waiver.

Am I right about that?

MS. GORDON: That is the argument, Your Honor. And if I could speak to the waiver program. It's a study, it's a three-year study. It's in process. It is to determine whether people with vision impairments, including monocular vision, one-eyed vision, which is essentially what Mr. Kirkingburg has, are safe or as safe or as reasonably safe driving trucks on the highway. And that study's in process. It hasn't been completed. And some of the recent evidence that we submitted in our reply memorandum and cited to there indicates that some of the participants are under-reporting accidents, particularly fatal accidents. And that the safety data and certainly the decision has not been made by the D.O.T. whether these people are safe or not.

And I think it's important to understand that the waiver is only a study, it's not a determination that these people are safe driving. It's an attempt by the Federal Government to determine whether or not by allowing them out there driving to see by their own records whether they are or are not sufficiently safe for the D.O.T. to change it's minimum requirements.

THE COURT: There was some study done after the court case brought by the advocates for highway and auto safety.

MS. GORDON: Right.

THE COURT: And that case by the DC Circuit struck down the waiver of provision, and so they did some studying, or at least put in the record some studies they've done for -- in answer to that case.

MS. GORDON: Well, they reopened, as I understand it, the comment and review period. But the study itself is ongoing. The actual study, the waiver program study, I believe is ongoing until March of 1996 after this trial will be over.

THE COURT: Well, suppose after March of 1996 this study indicates that it's appropriate to grant waivers in

connection with safe drivers and all the other requirements that they put on it. Would you agree the defendant had to hire him?

MS. GORDON: Not necessarily. If the minimum qualifications still stand and it continues to be a waiver program, I'd say the plaintiff's case would be stronger at that point, but I don't think he would be all the way to the barn.

THE COURT: Rich, what do you say?

MR. BUSSE: I think that at the very least -- I think you have to look at the individual, frankly. I don't think that an employer can simply say we have more stringent requirements and exercise a blanket exclusion policy. I think you have to look to see whether or not a reasonable accommodation can allow someone to become a worker that can perform the essential functions of that position.

In this particular case I think that inasmuch as he has driven without incident, inasmuch as he was judged to be safe in the driver road test by Albertson's, inasmuch as he was allowed to become employed as a driver, given the vision from the outset, it didn't comport with the 20/40 Sullen (ph) requirement that was in the D.O.T. What they looked at is whether or not he had a card. That's what they looked at. In 1990, in 1991. And the doctor said you need a vision waiver. Their own doctor said, Dr. Douglas Eubanks, you need a vision waiver. He went to get the vision waiver and then they said no, we're not going to assist you in that, not going to recognize vision waivers.

Well -- and along that line, Judge, if I may, I have some additional materials that I would like to submit since there were some additional materials with the reply, that include a file that was provided October 17th that is the driver qualification file on Mr. Kirkingburg. There's only one page of which that is any new material. But that has to do with a handwritten note and it's in, I believe, Mr. Charlie Norris' handwriting.

MS. GORDON: I don't believe that's accurate.

THE COURT: Wait a minute. Let him finish and then I'll give you a chance.

MS. GORDON: Well, he looked at me for confirmation.

MR. BUSSE: And this is to Mr. Frank Riddle. This is a note that is in Mr. Kirkingburg's file. And it says the clinic called, said how they had gotten a waiver from the D.O.T. and all he needed was his card. It told him we have to sign off on the waiver for it to be effective. They sent us his card. Now, this is the Eubanks Clinic. Because I said we don't want him to have it.

So, again, the doctor for Albertson's is prepared to go ahead with this on the basis of the waiver, and it's the employer that is blocking that.

So -- now, if that is not Mr. Norris' handwriting I would appreciate it if you could identify whose it is.

MS. GORDON: I don't know whose it is and I can't confirm that it's Charlie's.

MR. BUSSE: Well, it's either Charlie's or Mr. Sturgill's's. But it's one of them.

THE COURT: In that event, it was on this letter in his file?

MR. BUSSE: Yes.

THE COURT: Well, I'm going to accept both of the offers for the defendant and for the plaintiff as part of the materials for the summary judgment.

MR. BUSSE: Then in further response, in the -- I have further materials that I would like to present to the Court and it relates to the very issue the Court is asking about.

In the technical assistance manual of the EEOC at page 2 of attachment A, on the right-hand side, it says, further, the ADA requires that even if a qualification standard or selection criterion is job-related and consistent with business necessity -- and that assumes for the sake of argument that the requirement in this case is -- it may not be used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criteria with a reasonable

accommodation.

And on the next page it gives the example of a forklift operator where there is a prerequisite of a 70-pound weight requirement. And it says this standard is job-related, however, it would be a reasonable accommodation to eliminate this standard for an otherwise qualified forklift operator who could not lift a 70-pound weight because of a disability.

So in this particular case what that illustrates is that the reasonable accommodation requirement goes both to the essential functions of the job and also to the prerequisites of the position in question.

And, further, on the right side it says --

THE COURT: Still on page 2 or --

MR. BUSSE: Still on page 3.

THE COURT: Three, un-huh.

MR. BUSSE: The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace, but, going further down, the ADA requires an objective assessment of a particular individual's current ability to perform a job safely and effectively. Generalized blanket exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology or that are based on fears about future medical or Workers' Compensation costs are unlikely to survive a legal challenge under the ADA.

Attachment D to these materials is the -- are excerpts from the deposition of Beatrice Michelle that were taken by Ms. Gordon on October 9th. And Dr. Michelle talks about how Mr. Kirkingburg is safe to drive. And it points out that he's been this way all his life and he's made adjustments in his monocular vision. Has been so -- has become used to picking out depth perception from cues that allow him to drive safely. So --

MS. GORDON: I'd like to respond to that.

THE COURT: All right. You may.

MS. GORDON: I brought the entire deposition that Mr. Busse has excerpted. And what Dr. Michelle in fact says is that she did no testing of him individually to see if he could use monocular cues. She's depending on a treatise and she read some experts of that treatise into her deposition. I asked her and it stands at page 22 which Mr. Busse has given you but it continues and I'd like to read it.

THE COURT: All right.

MS. GORDON: Question: Did you and Mr. Kirkingburg discuss the kinds of trucks and the kinds of conditions which he drives? Answer: Not specifically.

Question: Do you know where he was driving that truck? Answer: I do not.

Question: Do you know under what conditions he was driving that truck? Answer: I do not.

Question -- we're now on page 23 which you don't have.

Question: Do you know if he drove at night? Answer: I do not.

Question: Do you know if he left the State of Oregon? Answer: I do not.

Question? Do you know if he ever had more than one trailer? Answer: I do not.

Now, that's relevant I think when you look at the kinds of things that Dr. Michelle talked about as being monocular cues for depth perception. One of the things, and this is at page 18, I asked, does your book or your own personal experience as an optometrist give you any information whether nighttime or low light situations would influence these various conditions you've just described? And one of the things she's talking about is the use of shadows to determine depth perception. And she answers, nighttime or low light definitely influence a person's vision. But whether they influence a person's monocular abilities with regard to depth is not known to me. That's not what I think of when a

person tells me they have problems with nighttime viewing.

Question: But you described something with sunlight reflecting on something? Answer: For shadows.

Question: For shadows? Obviously at night you wouldn't have those cues, would you? Answer: No, but you have of course other cues and you also have overhead lights.

And then she goes on and talks about streetlights and lights coming towards you and lights behind you. But in fact Mr. Kirkingburg was driving around night and day on interstate highways where often, as you know, you don't have lights. There's no shadow cues.

Question on page 19: Are there nonetheless some binocular cues that two-eyed people, people with good sight in both eyes, would rely on for distance depth perception? Answer: Well, I would imagine so. Again, I'm not the expert in this area per se. My understanding is that it is most influential at the near distance and its affect, its impact on the distance is not something I can quantify for you.

To the extent Dr. Michelle gave any individualized test to Mr. Kirkingburg, she gave him the stereoptic near vision depth perception test and found him to be functioning as a monocular person with no depth perception at all.

So to the extent she did any individualized testing with him, she found a complete lack of depth perception. Then she relies on the population in general in monocular people. They to some extent develop this depth perception at distance from these five different areas. One of them is the use of light and shadows. Another one is just the position of near things and far things. She described three other such kinds of cues that people use.

So to the extent that Mr. Busse would have the Court believe that there's been some individualized test that said that Mr. Kirkingburg himself personally is safe on the highway, I don't think we have that.

I'd just like to speak briefly to the other things he mentioned.

The portion of the handwritten note which I can't identify for you. I don't know whose handwriting this is. But he's making the assumptions that's something's coming from a clinic. I don't know. I would ask the Court to look at that yourself. I think it's very unclear where it came from, where the card came from or what it means. I don't know what it means.

THE COURT: Did the company know of the plaintiff's condition in earlier times when he was driving for them?

MS. GORDON: No. In fact, the company had on its records, as Mr. Busse's pointed out to the Court, eye tests. But all they relied on was, as Mr. Busse correctly said, was the card. When he came in with the card it said from the company's clinic.

This is, by the way, not the company's doctor. Dr. Douglas Eubanks is not employed by Albertson's. His clinic is on a contract with Albertson's. And as Mr. Busse knows from the deposition he took of him, it's only one of many employers that they -- and then they have -- it's only 20 percent of their -- their practice is to look at employment cases and the rest of it is just regular patients, so this is not some doctor hired by Albertson's in the sense that you might think.

MR. BUSSE: Might I speak to that point?

THE COURT: Wait until she finishes.

MS. GORDON: Anyway, there are many, many different Doctor Eubanks in that clinic. And the first test was given to him by Dr. Robert Eubanks. And he technically failed it. And yet Dr. Robert Eubanks wrote him out a little card. When he brought his materials back in, all the company looked at was the card. He was certified as passing. They thought he was okay.

The next time he was sent for a D.O.T. check at that same clinic, Dr. Eubanks did the eye check on him and he came back with the card signed. He shouldn't have. In fact he was not safe to drive under the D.O.T. regular minimum standards

at any point when he was employed by Albertson's.

This case has kind of a strange connotation to it. This man never should have been hired to drive again in the first place. And yet he was hired to drive, and he did drive for a year before he had his Workers' Comp accident which was not related to driving and was off for a year.

So he did drive for them for a year. He did fail the vision test three times and they only picked up that it was a failure the third time when Dr. Douglas Eubanks gave him the vision test and noticed for the first time he had failed it.

THE COURT: All right. Mr. Busse.

MR. BUSSE: Thank you. Again, the material that the Court has received, I attached excerpts to his driver qualification file which was presented to me earlier this week. And that file is Albertson's drivers' qualification file and does contain the examinations of Teresa Eubanks on February 5th, 1991 that show him as 20/100 that time. And she gave him a certification card. And this is not his doctor, that's the company's doctor.

And also Robert Eubanks, upon his initial exam on August 18, 1990, he rated him as 20/70 and gave him a card. And that's in the company's file. So they knew, they had this information. So their doctor went ahead and passed him. And what they were concerned -- they knew what his -- or they had information concerning his vision and they had his card.

THE COURT: Okay. Give you two more minutes if you need some more.

MS. GORDON: Okay. I probably don't need a full two minutes.

I want to go back to Rich's point on blanket exclusions. And I think we have a real distinction here with the D.O.T. regulations and EEOC guidelines saying that when there are issues of public safety and the D.O.T. has made a minimum qualification, those can be accepted as blanket exceptions. We cited that in our brief. The materials are there.

So I think we have a very unique area where normally I would agree with Mr. Busse that people need to be looked at. You can't assume all one-armed people can't do something, et cetera, et cetera, or other types of impairments.

In think in areas of public safety you do have the EEOC guidelines guiding the Court and the employers as to what happens there.

That's it.

THE COURT: All right. I will take a little closer look at this and advise you promptly.

MS. GORDON: Thank you.

MR. BUSSE: Thank you, Judge.

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause.

s/ Dennis R. Grube 2-8-96
DENNIS R. GRUBE DATE
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	OPINION
	)	Filed Oct. 25, 1995
ALBERTSONS, INC., a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

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Attorneys for Defendant

PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.

§§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff, who worked as a truck driver, alleges that defendant illegally terminated him because he is almost blind in one eye.

Defendant moves for summary judgment. I grant the motion.

BACKGROUND

Since childhood plaintiff has had amblyopia in his left eye, "an impairment of vision without detectable organic lesion." Roth v. Lutheran General Hospital, 57 F.3d 1446, 1449 n.3 (7th Cir. 1995). The condition, which cannot be corrected, leaves plaintiff almost blind in his left eye.

Plaintiff became a commercial truck driver in 1979. Defendant hired him in August 1990. Plaintiff has had a clean driving record.

The United States Department of Transportation (DOT) regulations require that interstate commercial truck drivers have "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses . . . ." 49 C.F.R. § 391.41(b)(10). Plaintiff has never met this vision standard, but managed to obtain DOT certification anyway. One physician certified plaintiff "[b]ecause he had been driving for many years with this type of vision without any apparent problems." Tom Affidavit, Exh. E, at 16 (Sayler Depo. at 10).

In 1991, plaintiff injured his head when he fell from a truck. When plaintiff was released to work in November 1992, defendant ordered him to undergo a medical examination. On November 6, 1992, Dr. Douglas reported that plaintiff did not meet DOT vision standards.

On November 20, 1992, defendant fired plaintiff.

According to Frank Riddle, a manager for defendant, "[w]e felt it was a matter of safety. We were solely concerned about the safe operation of our vehicles." Plaintiff's Concise Statement at 84 (Riddle Depo. at 13).

Plaintiff applied for a "vision waiver" from the Federal Highway Administration (FHWA), which would give him DOT certification despite his amblyopia. The FHWA started the vision waiver program in 1992, partly because of the national policy "'to facilitate the employment of qualified individuals with disabilities.'" Advocates for Highway and Auto Safety v. Federal Highway Admin., 28 F.3d 1288, 1290 (D.C. Cir. 1994) (quoting 57 Fed. Reg. 31,458, 31,459 (1992)). Applicants needed a valid commercial license and three years' recent experience driving a commercial vehicle without moving violation citations, license suspensions, or driving-related convictions. Id. at 1290-91.

Plaintiff had the requisite clean driving record. He also had a letter from an optometrist, Beatrice Michel, stating that his vision had "not worsened since his last vision examination and is not expected to change in the future." Plaintiff's Concise Statement at 137. Dr. Michel concluded, "As a licensed doctor of optometry, my opinion is that Mr. Kirkingburg can easily perform the driving tasks required. He has normal visual acuity (20/20) in the right eye, and the amblyopia in the left eye will not interfere with his ability to drive." Id. Plaintiff received a vision waiver in early 1993, but defendant refused to accept it.

In August 1994, the United States Court of Appeals for the District of Columbia Circuit struck down the vision waiver program, holding that the FHWA had not shown empirical evidence that the waivers were "'consistent with the safe operation of commercial motor vehicles.'" Advocates for Highway and Auto Safety, 28 F.3d at 1293 (quoting former 49 U.S.C. app. § 2505(f), now codified at 49 U.S.C. § 31136(e)). Because the waiver program was a "significant departure" from the FHWA's previous vision

standards, the agency had a special burden to justify it. Id.

In November 1994, the FHWA determined that it would continue vision waivers for the approximately 3,000 drivers in the program, including plaintiff, until March 31, 1996. 59 Fed. Reg. 59,386, 59,387 (1994). The FHWA noted that the fatal accident rate for waived drivers was higher than for other drivers, but considered that unimportant because fatal accidents were rare and the waived drivers involved had not been found to be at fault by the reporting police officers. The agency conceded that information produced by the vision waiver program "will never answer the question as to what the standards should be," and concluded that "[t]he vision standard found at 49 CFR § 391.41(b) (10) will remain in effect until the completion of [future] research and the implementation of any new standard." Id. at 59,389-90.

STANDARDS

The court must grant summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex Corp v. Catrett, 477 U.S. 317, 322-23 (1986).

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The court should resolve reasonable doubts about the existence of an issue of material fact against the moving party. Id. at 631. The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. Id. at 630-31.

DISCUSSION

The ADA prohibits covered employers from discriminating against qualified individuals with disabilities. 42 U.S.C. § 12112(a). To make a prima facie case under the ADA, plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994); White v. York Int'l Corp., 45 F.2d 357, 360-61 (10th Cir. 1995); see also Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (elements of prima facie case under Rehabilitation Act).

Defendant contends that as a matter of law plaintiff was not a qualified individual. A "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The court should consider the employer's judgment on which job functions are essential. Id.

In deciding whether plaintiff was a qualified individual, the court must first "determine whether [plaintiff] could perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue." Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S. Ct. 1386 (1994). If plaintiff cannot perform the essential functions of the job, the court must then determine "whether any reasonable accommodation by the employer would enable [plaintiff] to perform these functions." Id. at 1394.

Defendant argues that because plaintiff did not meet the DOT vision standards, he could not perform an essential function of his job. I agree with defendant that it properly considered meeting DOT minimum requirements essential to

plaintiff's job.

Plaintiff argues that defendant should have reasonably accommodated him by granting him a leave of absence to obtain a vision waiver. However, the ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a flawed experiment that has not altered the DOT vision requirements.

No reasonable accommodation is possible. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt, 864 F. Supp. at 997; Buck v. United States Dep't of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements). If plaintiff were ever involved in an accident, defendant would have difficulty explaining why it hired a driver who could not meet DOT vision requirements. Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993) ("'Woe unto the employer who put such an employee behind the wheel'"; driver who failed DOT vision standards presented "genuine substantial risk that he could injure himself or others" (quoting Collier v. City of Dallas, No. 86-1010, 798 F.2d 1410, slip op. at 3 (5th Cir. Aug. 19, 1986) (unpublished)), cert. denied, 114 S. Ct. 1386 (1994).

Plaintiff argues that defendant's policy of rejecting all vision waivers violates the need for individual assessments under the ADA. See Sarsycki v. United Parcel Service, 862 F. Supp. 336, 341 (W.D. Okla. 1994) (ADA requires employer to make individualized assessment); 59 Fed. Reg. 50,887, 50,888 (1994) (FHWA stated that "a preferable standard [to the absolute 20/40 requirement] would allow drivers to demonstrate their individual ability to drive safely, in spite of their vision deficiency."). As plaintiff points out, his driving record is clean and an optometrist has attested that his vision is adequate. However, I conclude that defendant

may rely on the DOT vision standards and need not make an individual assessment of plaintiff's ability to drive. See Buck, 56 F.3d at 1408-09 (DOT deafness standards) and Ward v. Skinner, 943 F.2d 157, 161-64 (1st Cir. 1991) (DOT epilepsy standards), cert. denied, 503 U.S. 959 (1992).

CONCLUSION

Defendant's motion for summary judgment (#24) is granted .

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	ORDER
	)	
ALBERTSONS, INC., a Delaware corporation,	)	
	)	
	)	
Defendant.	)	

PANNER, J.

Defendant's motion for summary judgment (#24) is granted.

IT IS SO ORDERED.

DATED this 25th day of October, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

(Caption omitted in printing)

MOTION FOR RECONSIDERATION

Plaintiff moves the Court for reconsideration of the Court's Order dated October 25, 1995, because it did not reconsider whether one form of reasonable accommodation would have been to reassign Plaintiff to the yard hostler position (see Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at pp. 5-7 and pp. 15-19) or to some other available and suitable position in lieu of termination (see Plaintiff's Concise Statement of Material Facts in Dispute, Nos. 4, 7 and 8, and Plaintiff's Additional Concise Statement of Material Facts in Dispute, No. 12).

DATED this 26th day of October, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

(Caption omitted in printing)

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

In his Motion for Reconsideration of the Court's Order of October 25, 1995 granting Defendant's Motion for Summary Judgment, plaintiff argues that the Court failed to consider whether defendant was obligated to reassign plaintiff to a yard hostler or other position as a form of reasonable accommodation. This argument is without merit for the following reasons.

Numerous federal courts, including the Ninth Circuit, have indicated that "reasonable accommodation" does not require an employer to find another job for an employee who is not minimally qualified for the position he holds.[1] See Defendant's Reply Memorandum at page 8 and cases cited therein; see also Bradley v. U. of Tex. M.D. Anderson Cancer Center, 3 F3d 922, 925 (5th Cir 1993), cert denied, ___ US ___, 114 S Ct 1071, 127 L Ed2d 389 (1994) (under Rehabilitation Act, where "reasonable accommodation cannot be made for the job he had, [plaintiff's] employer has no duty to reassign Bradley to any particular job ***"); Bates v. Long Island R. Co., 997 F2d 1028, 1035 (2nd Cir), cert denied, ___ US ___, 114 S Ct 550, 126 L Ed2d 452 (1993) (Rehabilitation Act case; "*** reasonable accommodation generally does not require an employer to reassign a disabled employee to a different position"). Therefore, once the Court had concluded that no accommodation could render plaintiff qualified for the driving position he had previously held, it

[1] Mr. Kirkingburg held the job of over-the-road truck driver, not yard hostler. Plaintiff's argument begs the question. The issue here is whether plaintiff could perform his over-the-road driving job with or without reasonable accommodation, not whether some other job -- like that of yard hostler -- could be so modified.

had no need to consider whether he might have been qualified for some other job.

Even the EEOC, which has indicated that reassignment to another job may be a possible form of "reasonable accommodation," has limited that suggestion to other vacant jobs. 29 CFR §1630.2(o)(2)(ii); see also Lawrence v. IBP, ___ F Supp ___, 4 AD Cases 632 (D Kan 1995) (even under EEOC's view, employer would have had no obligation under ADA to transfer disabled employee to a job that was not vacant at the time she was terminated; granting summary judgment for employer). Here, the plaintiff was terminated in November 1992, after the employer learned that he did not meet the FHWA vision standard. The employer suggested the possibility of putting the plaintiff into the yard hostler position in May 1993, several months after his termination, as part of a proposed settlement of his grievance under the labor contract (a grievance that was subsequently denied by a joint conference board). See Sturgill Deposition, Ex 41 (letter dated May 17, 1993 from Dona Pike King to Roy Dwiggins), attached to Plaintiff's Concise Statement of Material Facts in Dispute; Affidavit of Dona Pike King, page 2, attached to Defendant's Memorandum in Support of Amended Motion for Summary Judgment; Affidavit of Vada Winn, Ex. 1, attached to Defendant's Memorandum in Support of Amended Motion for Summary Judgment. There is no evidence that a yard hostler position was vacant at the time plaintiff was terminated. Thus, even assuming the employer's reasonable accommodation obligation encompassed the duty to offer plaintiff another position, and further assuming (contrary to the record) that the plaintiff could have met the minimum standards (including the DOT vision standards) for a yard hostler job, there is absolutely no factual basis to support a finding that such an accommodation could have been made at or about the time the plaintiff was terminated. The Court should not penalize the employer for attempting to resolve the plaintiff's grievance by holding that

the proposed settlement somehow retroactively raised the threshold of the employer's legal obligations under the ADA; such a ruling would make it difficult, if not impossible, for unions and employers to negotiate grievance settlements in cases involving potential ADA claims. Nor is there any legal support for plaintiff's apparent belief that the employer's obligation to reasonably accommodate him should extend long after his termination and (hypothetically) into eternity. In any event, the employer did subsequently offer the plaintiff another job (tire mechanic) for which it even offered to train him, but the plaintiff rejected this job after he was told that it would not lead to a return to a driving position. Kirkingburg Deposition at 86-87, attached to Affidavit of Michael Tom, Defendant's Memorandum in Support of Amended Motion for Summary Judgment.

Plaintiff's reference to "some other available and suitable position" in his motion for reconsideration reveals that he is attempting to import into the federal ADA the language of ORS 659.420, dealing with the reinstatement rights of workers with compensable injuries who are not able to return to their previous jobs. That state statute has nothing to do with the federal law governing this case. While plaintiff may now wish that he had brought such a suit, he has not.

For all of the foregoing reasons, plaintiff's motion for reconsideration is not well-taken and should be denied.

DATED this 6th day of November, 1995.

Corbett Gordon & Associates

s/ Corbett Gordon
Corbett Gordon, OSB #82009
Attorneys for Defendant

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	ORDER
ALBERTSONS, INC., a	)	
Delaware corporation,	)	
	)	
Defendant.	)	

PANNER, J.

Plaintiff Hallie Kirkingburg brings this action under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213, against his former employer, defendant Albertson's, Inc. Plaintiff alleges that he was a truck driver for defendant and that defendant terminated him because he has 20/200 vision in his left eye.

I granted defendant's motion for summary judgment. Plaintiff now moves for reconsideration, arguing that I should have determined whether reassigning plaintiff to a yard hostler position could have been a reasonable accommodation under the ADA. I deny the motion to reconsider.

Neither party cited controlling Ninth Circuit authority on whether an employer's duty to provide reasonable accommodation includes finding the disabled employee an alternative job. Cf. Buckingham v. United States, 998 F.2d 735, 740 (9th Cir. 1993) (under Rehabilitation Act, reasonable accommodation may include transfer to same position in different location). For this motion, I will assume that reassigning plaintiff to a vacant position is a possible reasonable accommodation. See Benson v. Northwest

Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995); but see Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995) ("the duty of reasonable accommodation does not encompass a responsibility to provide a disabled employee with alternative employment when the employee is unable to meet the demands of his present position"). However, plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of the job. "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994); see also Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position).

CONCLUSION

Plaintiff's motion for reconsideration (#50) is denied.

IT IS SO ORDERED.

DATED this 9th day of November, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HALLIE KIRKINGBURG,	)	
	)	
Plaintiff,	)	CV 95-549-PA
v.	)	
	)	JUDGMENT OF
ALBERTSONS, INC., a	)	DISMISSAL
Delaware corporation,	)	
	)	
Defendant.	)	

Judgment is for defendant. This action is dismissed.

DATED this 15th day of December, 1995.

s/ Owen M. Panner
OWEN M. PANNER
U.S. District Court Judge

(Caption omitted in printing)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Hallie Kirkingburg, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on December 15, 1995.

DATED this 22nd day of December, 1995.

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050
Of Attorneys for Plaintiff

(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HALLIE KIRKINGBURG, Plaintiff-Appellant, v. ALBERTSON'S INC., a Delaware corporation, Defendant-Appellee.	Court of Appeals No. DC No. 95-549-PA District of Oregon (Portland)

APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

1. Basis For District Court Jurisdiction

The district court had federal question jurisdiction over Plaintiff's disability discrimination claim brought under the Americans With Disabilities Act, 29 U.S.C. §12110, et. seq. ("ADA"), pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343(a)(4).

2. Basis For Court Of Appeals Jurisdiction

Plaintiff is appealing from the Opinion and the Order

entered in this action October 25, 1995, from the Order entered November 3, 1995, and from the Judgment ordered in this action in favor of Defendant entered on December 15, 1995, Excerpt of Record (hereafter "ER") 211-220, 223-225, 226, which is a final judgment that disposes of all claims with respect to all parties. CR 48, 49, 53, 54. Pursuant to 28 U.S.C. §1291, the judgment is appealable and this Court of Appeals has jurisdiction to consider this appeal. Plaintiff filed his Notice of Appeal on December 22, 1995. ER 227-228. This appeal is timely under Rule 4(a)(1) of the Federal Rules of Appellate Procedure.

ISSUES PRESENTED ON APPEAL

1. Whether the district court erred in granting summary judgment when it held Plaintiff was not a qualified individual under the Americans With Disabilities Act.

2. Whether the district court erred in holding that no reasonable accommodation was possible and specifically that Defendant was not obligated to accept Department of Transportation ("DOT") vision waivers.

3. Whether the district court erred in holding that Defendant could rely on DOT vision standards and need not make an individual assessment of Plaintiff's ability to drive.

4. Whether the district court erred in holding that Defendant was not required to make a reasonable accommodation by transferring Plaintiff to a truck hostler position or some other available and suitable position in lieu of termination, when Plaintiff had a state statutory right to reinstatement as an injured worker.

INTENT TO SEEK ATTORNEYS' FEES

Plaintiff intends to seek reasonable attorneys' fees for this appeal under the authority of 42 U.S.C. §12117, which incorporates the availability of attorneys' fees as provided under Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Plaintiff, a former employee of Defendant, brought this action in federal court alleging disability discrimination under the Americans With Disabilities Act, 29 U.S.C. §12110, et. seq. Defendant moved for summary judgment and was allowed leave to amend its motion for summary judgment. The court granted Defendant's motion for summary judgment. Plaintiff moved for reconsideration. The court denied Plaintiff's motion for reconsideration. Judgment dismissing the action was entered on December 15, 1995.

STATEMENT OF FACTS

Plaintiff was first employed by Defendant as a truck driver in 1990. CR 27, p. 56; CR 27 is reproduced at ER 11 to 176.

Plaintiff was born May 21, 1938. CR 27, p. 15. He has an associate degree from Cerritos Junior College in Norwalk, California. Id at 16. He was a jet aircraft mechanic in the United States Air Force, where he was a crew chief to a basic air commander. Id. at 17-19. From 1969 to 1978 or 1979 he was an auto mechanic for Los Angeles County. Id. at 43-44. He also did some road test driving for the county. Id. at 45-46. He left the county to

drive trucks, first for Global Van Lines, then as an independent trucker. Id. at 45, 47, 48. He owned his own Kenworth truck. Id. at 48-49; Pl. Depo. 153-4. He moved to Oregon in 1980 or 1981 where he settled in Tillamook County and won the county garbage hauling contract. Id. at 50-52; Pl. Depo. 155-7. He kept that contract until 1988 or 1989, when he began driving trucks for Pastega Trucking. Id. at 53-55; Pl. Depo. 159-61. He continued driving for Pastega until he began work for Albertson's as a truck driver in 1990. Id. at 56; Pl. Depo. 165.

Plaintiff has a good driving record. CR 27, p. 57-58, 63-64; Pl. Depo. 234-235, 280-281. He has never been in an accident that was his fault. Id. He has no disqualifying moving citations on his driving record. Id., at 130, 121; Ex. 3; Sturgill Depo. 38.

At the time Plaintiff was hired by Defendant, Ted Sturgill, transportation manager, gave him a 16-mile road test and certified, "It is my considered opinion that his [sic] driver possesses superior driving skill to operate safely the type of commercial motor vehicles listed above." CR 27, p. 133, 122-23; Ex. 20; Sturgill Depo. 47-48. The reference listed above was to a 1988 Kenworth, with a 1989 50' utility trailer. Id. at 133; Ex. 20. Mr. Sturgill found Mr. Kirkingburg to be a safe driver in that road test. Id. at 122-23; Sturgill Depo. 47-48. Plaintiff was given a physical examination and passed at the time of his hire in 1990. Id. at 117-18, 135; Sturgill Depo. 34-5; Ex. 22. He had a valid DOT card to drive a truck at that time. Id. at 119; Sturgill Depo. 36. Thereafter, Mr. Sturgill found Plaintiff to be a safe driver. Id. at 115; Sturgill Depo. 32. Likewise, his boss, Frank Riddle, General Manager, found Plaintiff to be a good,

safe driver. Id. at 78, 79, 85-86; Riddle Depo. 5, 6, 14-15. Plaintiff had a valid DOT card in 1991. Id. at 117, 136; Sturgill Depo. 34, Ex. 23.

Plaintiff has always had 20/200 corrected vision in his left eye. CR 27, p. 5; Pl. Aff. and Pl. Depo. 42-43. He is 20/20 corrected in his right eye. Id. at 9; Aff. of Beatrice Michel. The reduced acuity in his left eye is due to amblyopia, a condition marked by low or reduced visual acuity not correctable by refraction means and not attributable to an eye disease. Id. at 9, 137; Aff. of Beatrice Michel; Ex. 24. The condition is said to exist if the vision is 20/30 or worse with best correction. Id. With that condition he could easily perform the driving tasks required of him, in the opinion of his doctor. Id. The amblyopia in the left eye does not interfere with his ability to drive. Id. According to Plaintiff, the condition has never interfered with his work. Id. at 25; Pl. Depo. 46.

Plaintiff suffered a work-related injury in 1991 when he had a fall from a truck and hurt his head, shoulder and hand. CR 27, p. 23-34; Pl. Depo. 36-37. He was released unconditionally to return to work on November 3, 1992. Id. at 37, 59, 141-42; Pl. Depo. 91, 252; Ex. 29. Instead of returning Plaintiff to work, Defendant sent Plaintiff to its doctor for examination. Id. at 38; Pl. Depo. 92. Plaintiff saw a Dr. Douglas Eubanks, who gave him an unusually thorough examination. Id. at 39; Pl. Depo. 94. He was told he needed a "vision waiver." Id. at 40; Pl. Depo. 95. Dr. Eubanks found his vision to be 20/200 in his left eye as of November 6, 1992. Id. at 132; Ex. 17. The doctor noted that this was his corrected vision in that eye "since birth." Id.

Defendant's drivers are to be certified by the

Department of Transportation. CR 27, p. 82-84, 115; Riddle Depo. 11-13; Sturgill Depo. 32. Defendant has no physical requirements for vision other than what is contained in DOT regulations. Id. DOT regulations call for a minimum 20/40 vision corrected in each eye. Id. at 146; Ex. 34. There is nothing in writing at Albertson's which specifically adopts those physical requirements as Defendant's own. Id. at 109; Sturgill Depo. 24. Prior to November 6, 1992, the DOT instituted a vision waiver program whereby under certain limited circumstances it would issue waivers to allow drivers who could not meet the minimum vision qualifications of DOT to operate motor vehicles. Id. at 127, 159; Sturgill Depo. 57; Ex. 43. The purpose of the program was to accommodate individuals where it was reasonable to do so under the American With Disabilities Act, but not sacrifice highway safety. Federal Register, Vol. 57, No. 58 at 10295 (March 25, 1992).

On November 20, 1992, Ted Sturgill called Plaintiff and informed him that, "We're not going to accept the waiver." CR 27, p. 26-27, 138; Pl. Depo. 69-70; Ex. 25. It was Mr. Sturgill's understanding that Plaintiff was terminated for failure to pass a DOT physical. Id. at 104; Sturgill Depo. 9. This was not his decision. Id. He does not know who made the final decision, but believes it came from "Boise Legal." Id. That decision was communicated to him by Mr. Frank Riddle. Id. Mr. Riddle told him that Plaintiff had failed the visual part of the DOT physical and that the company would not accept a vision waiver. Id. at 105; Sturgill Depo. 10. Mr. Riddle told him Plaintiff was "legally blind or blind in one eye." Id. at 110; Sturgill Depo. 25. Mr. Sturgill testified there was no other reason for the termination. Id. at 106;

Sturgill Depo. 20. Mr. Sturgill testified that Mr. Riddle directed him to terminate Plaintiff. Id. at 107; Sturgill Depo. 22. Prior to that time, Mr, Sturgill had seen nothing in writing that the company would not accept vision waivers. Id. at 109; Sturgill Depo. 24. A termination form was completed for Plaintiff at that time. Id. at 72, 139; Norris Depo. 9; Ex. 26.

Mr. Sturgill recalls discussion about other positions for Plaintiff to perform. CR 27, p. 107; Sturgill Depo. 22. He does not recall if there was discussion about other work for Plaintiff before his termination. Id. at 108; Sturgill Depo. 23. Mr. Sturgill did not try to find Plaintiff work. Id. at 113; Sturgill Depo. 30. Mr. Riddle was aware that the employer had to reasonably accommodate disabled persons and testified he believed efforts were made by the company to find other jobs for Plaintiff. Id. at 80-82, 90; Riddle Depo. 9, 10, 11, 22. He expected his subordinate to look for other work for Plaintiff, specifically Charlie Norris was expected to do that. Id. at 92; Riddle Depo. 24. He testified that had Plaintiff not turned down a "yard hostler" and "tire man" positions, he would be employed there today. Id. at 101-102; Riddle Depo. 57-58.

Defendant did make some contacts with Plaintiff to offer him other positions. CR 27, p. 13-14; Depo. 4-5. Plaintiff was an injured worker who under Oregon Law had reinstatement rights. Id. at 20; Pl. Depo. 29 (ORS 659.415 and 659.420). Further, Defendant's own policy required reasonable accommodation. Id. at 74, 129; Norris Depo. 24; Ex. 1. In addition, as memorialized in the Scott Jardine, Corporate Director of Transportation, memorandum of June 4, 1993: "In situations where reasonable accommodation to a driver with a disability

are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver." Id. at 127, 159; Sturgill Depo. 57; Ex. 43.

Plaintiff remembers a call about a job moving trailers which he thought he had. CR 27, p. 13; Pl. Depo. 4. This was a "yard hostler" position. A yard hostler drives trailers within the confines of the facility, moves empty trailers into the dock, loads ones away from the dock, and stages them for dispatch. Id. at 93, 114; Riddle Depo. 27; Sturgill Depo. 31. Although DOT certification is required for that position, it does not have to be. Id. at 96; Riddle Depo. 40. The position is designed so it can be retained in the yard. Id. at 97; Riddle Depo. 41. The hostlers are not allowed on the road. Id. at 96; Riddle Depo. 40. To begin with, the equipment they operate is not road licensed. Id. If they are out on the road they are "in violation." Id. The job is required seven days a week, 24 hours a day, and is staffed with five or six positions, which positions can be temporary or permanent. Id. at 96, 98-99; Riddle Depo. 40, 42-43.

This was the first job Defendant spoke with Plaintiff about. CR 27, p. 29, 158; Pl. Depo. 77; Ex. 41. Plaintiff was asked by his union rep to call Frank Riddle, which he did. Id. at 29; Pl. Depo. 77. Mr. Riddle said he did not know about it and that he would have Frank Sturgill call back. Id. at 30; Pl. Depo. 78. Mr. Sturgill called back and said Plaintiff was supposed to go to the Portland distribution center, which he did. Id. After a one hour wait, Mr. Sturgill rudely asked Plaintiff if he had a DOT card, and Plaintiff replied he did and showed it to him. Id. at 31; Pl. Depo. 79. By this time, Plaintiff had obtained a DOT vision waiver and a valid DOT card. Id. at 32; Pl. Depo. 80. Mr. Sturgill gave Plaintiff papers to

read on how to hook up a trailer and asked him to wait in the lunch room. Id. Then, Dave Cooper, dispatch supervisor, told Plaintiff that Mr. Sturgill said to take the papers home and read the, stating "We'll be calling you." Id. at 32-33; Pl. Depo. 80-81. Plaintiff went home, but was never called. Id. at 33; Pl. Depo. 81. He was never given an explanation why he did not get that job. Id. at 14; Pl. Depo. 5. Mr. Riddle was told by Don King, an attorney with Albertson's, that Plaintiff had turned down the yard hostler position. Id. at 100; Riddle Depo. 55. Plaintiff never turned it down. Id. at 6; Pl. Aff.

Subsequently, Defendant informed the Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." CR 27, p. 163; Ex. 48. Mr. Riddle was unaware the offer had been withdrawn. Id. at 94; Riddle Depo. 29. Mr. Norris was unaware it had been made. Id. at 76; Norris Depo. 34.

Sometime later, the second job which was discussed with Plaintiff was a "tire man," but Plaintiff rejected that position because he had never changed a truck tire in his life, was told it would be $8 - $9 per hour, which was $5 - $6 less than what he had been earning, and would not get him back to driving trucks. CR 27, p. 34-46; Pl. Depo. 85-87. He also recalls that there was an experience requirement for that job that he did not satisfy. Id. at 41; Pl. Depo. 101.

Other jobs which became available, but which were not discussed with Plaintiff, included warehouse and dispatcher positions. CR 27, p. 66, 67, 90, 91; Cooper Depo. 5, 7; Riddle Depo. 22, 23.

Although Defendant claimed it would not allow its drivers to drive unless they met the minimum DOT vision

physical requirement of 20/40 corrected vision in each eye (CR 27, p. 160-62; Ex. 47), Plaintiff was allowed to drive for it when first hired in 1990 despite a corrected vision of 20/70 in his left eye, according to a company doctor, Robert Eubanks (CR 27, p. 135; Ex. 22), and was permitted to drive in 1991 despite a corrected vision of 20/100 in his left eye, according to a different company doctor, Theresa Eubanks. CR 27, p. 125, 136; Sturgill Depo. 52; Ex. 23. These reports were in Defendant's possession at the time, and raised no "red flags," so to speak. Id. at 60, 62, 110, 111, 112, 115-116, 119, 123, 124; Pl. Depo. 262-4; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49. No effort was made to disqualify him. Id. at 116; Sturgill Depo. at 33. He was thought to be a safe driver. Id. at 115; Sturgill Depo. at 32.

Defendant's personnel manager was aware of its reasonable accommodation requirement, but knows of no undue hardship which would have been caused to it by accepting a vision waiver. CR 27, p. 69-71, 74; Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability." Id. at 120; Sturgill Depo. 37. Yet, Mr. Riddle testified that when Plaintiff drove for Albertson's he was not a safety hazard. Id. at 86; Riddle Depo. 15.

Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements, but if the DOT said to accommodate disabled persons it may waive certain of those requirements, this would not be acceptable. CR 27, p. 84; Riddle Depo. 13.

Mr. Riddle said that according to the reports he saw, Plaintiff's vision was deteriorating. CR 27, p. 86; Riddle Depo. 15. He testified that before making the decision to terminate, he instructed Charlie Norris, personnel

manager, to review Plaintiff's vision file with Plaintiff. Id. at 87-89; Riddle Depo. 16-18. This never happened. Id. at 5-6, 72-78; Pl. Aff; Norris Depo. 9-10. It was not true that Plaintiff's vision had been deteriorating. Id. at 5-9, 137; Pl. Aff; Aff. of Beatrice Michel; Ex. 24. Plaintiff's vision in his left eye tested out by his own doctor at 20/200 in 1988 and on October 19, 1992. Id. at 131, 134; Ex. 16; Ex. 21. There was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Id. at 128; Sturgill Depo. 58.

After Plaintiff's termination, he received a vision waiver from the Department of Transportation. CR 27, p. 28; Pl. Depo. 75. This was obtained on February 25, 1993. Id. at 28, 149-150; Pl. Depo. 75; Ex. 36; Ex. 37. He had requested Defendant's help in obtaining the waiver in December 1992 because the DOT required that the employer provide certain of the information necessary to obtain the waiver. Id. at 143-45; Ex. 32. He had first applied for the waiver on November 12, prior to the November 20 call terminating his employment. Id. Defendant's personnel manager was instructed by Mr. Riddle not to respond to the request. Id. at 75, 99; Norris Depo. 32; Riddle Depo. 43. Mr. Riddle told him he would take that up with the corporate people. Id. at 99; Riddle Depo. 43. Plaintiff advised Defendant he obtained the vision waiver on March 1, 1993. Id. at 152-157; Ex. 39; Ex. 40. Mr. Sturgill became aware he had received it. Id. at 126; Sturgill Depo. 56.

Plaintiff had also requested to be reinstated on December 18, 1992. CR 27, p. 141-42; Ex. 29. That request was denied. Id. at 146; Ex. 34.

Plaintiff was identified by Defendant as the "driver with the vision problem in Portland" by Scott Jardine on

January 29, 1993. CR 27, p. 148-149; Ex. 35.

ARGUMENT

I. The Lower Court Erred In Granting Defendant's Motion For Summary Judgment Because Plaintiff Raised A Genuine Issue Of Fact As To Whether Plaintiff Was A Qualified Individual Under The Americans With Disabilities Act.

A. Plaintiff Adduced Evidence Which Raises A Question Of Fact As To Whether He Could Perform The Essential Functions Of His Job With Or Without Accommodation.

Plaintiff brought disability/perceived disability discrimination claims based upon his visual impairment under the American With Disabilities Act (hereafter "the ADA"), 42 U.S.C. §12101, et. seq., which prohibits covered employers from discriminating in the terms, conditions and privileges of employment against a qualified individual with a disability. 42 U.S.C. §12112(a).

To make a *prima facie* case under the ADA, the plaintiff must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) the defendant terminated him or subjected him to some other adverse employment action because of his disability. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 996 (D. Or. 1994).

Under the ADA, an individual is protected if he or she is:

> (1) a person with a physical or mental impairment that substantially limits one or more major life activities;
>
> (2) a person with a record of such physical or mental impairment; or
>
> (3) a person who is regarded as having such an impairment.

42 U.S.C. §12102(2). The ADA defines a physical impairment as:

> "[a]ny physical disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs . . . ."

29 C.F.R. §1630.2(h).

A "major life activity" is defined to include seeing or working. 29 C.F.R. App. §1630.2(I).

It has been held under the Rehabilitation Act of 1973 that someone who is legally blind is a handicapped individual.[1] *Norcross v. Sneed*, 573 F.Supp 533, 536 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (8th Cir.); *see Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3rd Cir. 1977) (a blind person "is certainly" a handicapped person under the

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[1]The ADA is patterned after the Rehabilitation Act of 1973, Pub.L. No. 93-112, 87 Stat. 355, codified as amended at 29 U.S.C. §2 701-796i, and it is appropriate when examining it to examine the scope of the federal law on which it is based. 29 C.F.R. §1630.1(c).

Rehabilitation Act). It has also been held that someone with extremely poor sight is handicapped under the Rehabilitation Act. *Sharon v. Larson*, 650 F.Supp 1396, 1401 (E.D. Pa. 1986) (it is not disputed that an individual who had visual acuity with the right eye of 20/200 and visual acuity with the left eye of 20/300 using corrective lenses is handicapped under the Act); *see generally* Francis M. Dougherty, Who is "Individual With Handicaps" Under The Rehabilitation Act of 1973 (29 U.S.C.S §§701 et. seq.), 97 ALR Fed 40, §4[b] and 4[c], pp. 58-60.

Defendant, below, did not challenge that Plaintiff's vision impairment qualifies as a physical impairment under the ADA; rather, Defendant argued Plaintiff is not an otherwise qualified individual.

1. Plaintiff Is A Qualified Individual With A Disability.

The ADA prohibits discrimination against any "qualified individual" with a disability. 42 U.S.C. §12112. Under the ADA, a "qualified individual with a disability" is one who "with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. §12111(8). The analysis under the ADA is two-step: First, whether the individual satisfies the prerequisites for the position; and, second, whether or not the individual can perform the essential functions of the position held with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Whether a particular function is essential is a factual determination that must be made on a case-by-case basis, considering all relevant evidence. 29 C.F.R. App. §1630.2(n). To be an essential function the function must bear more than a

marginal relationship to the job at issue. *Chandler v. City of Dallas*, 2 F.3d 1385, 1393 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 1386 (1994).

Defendant argued below that Plaintiff was not otherwise qualified because Plaintiff did not meet the DOT minimum requirements for interstate truck driving, which Defendant considers to be an essential requirement of the job. CR 24; Def's Memo in Supp of Mo for Sum. J at 6. The premise of Defendant's argument was that Plaintiff needed to meet the DOT physical requirements for interstate truck driving and that therefore those physical requirements themselves equate to an essential prerequisite of the job. However, it is not the physical vision requirements set by DOT that are a prerequisite for the position; it is, according to Defendant's management, the DOT certification. *See* CR 27, p. 82-84, 109, 115, 127, 159; Riddle Depo. 11-13; Sturgill Depo. 24, 32, 57; Ex. 43. Mr. Riddle testified that Defendant would accept changes in the DOT minimum requirements. CR 27, p. 84.

Defendant has no physical prerequisites for vision other than what is contained in the DOT regulations. CR 27, p. 82-84, 115; Riddle Depo. 11-13; Sturgill Depo. 32. Plaintiff's argument that the DOT vision requirements themselves are not truly a legitimate prerequisite is strengthened by the fact that although Defendant claimed it would not allow drivers to drive unless they met the minimum DOT vision requirement in each eye, [2] Defendant did not previously apply that alleged

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[2]DOT requirements are corrected vision of at least 20/40 in each eye. Ex. 47.

prerequisite to Plaintiff. Indeed, Plaintiff was hired to drive in 1990 despite a recorded corrected vision of 20/70 and permitted to drive in 1991 despite a recorded corrected vision of 20/100. DR 27; p. 136; Sturgill Depo. 52; Ex. 23; Ex. 47; Supplemental Materials, CR 44, at ER 182. These reports of supposedly deficient vision did not raise any concerns ("red flags") to Defendant's management at the time and no attempt was made to disqualify Plaintiff. CR 27, pp. 60-62, 110, 111-112, 115-16, 119, 123-124; Sturgill Depo. 25, 26, 28, 32-33, 36, 48, 49; Pl. Depo. 262-4. Viewed in the light most favorable to Plaintiff, the evidence is that Defendant considered a prerequisite for the job to be that Plaintiff had a DOT card, that is DOT certification; not that Plaintiff's vision met minimum requirements, specified or otherwise. Thus, evidence exists that raises a question of fact as to the first step in the essential functions analysis: Whether Plaintiff satisfied the legitimate prerequisites of the job of truck driving.

The second step of the analysis is whether Plaintiff could perform the essential functions of the position of truck driver with or without reasonable accommodation. 29 C.F.R. §1630.2(m). Significantly the employer's duty of reasonable accommodation applies to both the essential functions of the job and may also apply to the prerequisites of the position in question. EEOC Technical Assistance Manual, 2 Accommodating Disabilities (CCH) ¶100.140 (1993), CR 45, pp. A 1-2, at ER 190 to 191. As stated in the EEOC Technical Assistance Manual,

> "the ADA requires that even if a qualification standard or selection criterion is job related and consistent with business necessity, it may not be

> used to exclude an individual with a disability if this individual could satisfy the legitimate standard or selection criterion with a reasonable accommodation." Id.; at ER 191.

The EEOC uses an example of a forklift operator, where the job has a physical requirement of an ability to lift a 70-lb. weight, where the essential function of the job is the mechanical operation of the forklift. CR 45, p. 3, at ER 192. The EEOC states that even where the physical requirement is legitimately job related, the requirement could be eliminated as a reasonable accommodation, where other employees could assist a disabled forklift driver. Likewise, here even if the vision requirements are a legitimate selection requirement, which as Plaintiff argues above they are not, they can be eliminated or altered as part of a reasonable accommodation, where Plaintiff could still perform the essential function of driving a truck. Here, that reasonable alteration would be the acceptance of a DOT vision waiver.

Here, Plaintiff adduced evidence that raises a question of fact as to whether Plaintiff could perform the essential function of truck driving. Plaintiff had performed the duties of the position without being at fault in an accident since his hire and for years before his employment with Defendant. See factual discussion, *supra*, at 3-4; CR 27, p. 57-58, 63-64; Pl. Depo. 234-235, 280-281. His supervisors tested him and believed he was a safe driver. CR 27, p. 78, 79, 85-86, 115, 122-123, 133; Sturgill Depo. 32, 47-48; Riddle Depo. 5, 6, 14-15; Ex. 20. His amblyopia in the left eye did not interfere with his ability to drive, never interfered with his work, and in the opinion of his doctor even with the condition he could

still easily perform the driving tasks required of him. CR 27, p. 9, 25; Pl. Depo. 46; Aff. of Beatrice Michel; Ex. 24. As Plaintiff's eye doctor explained in deposition testimony, there are many "monocular cues" to depth perception that people with Plaintiff's condition develop, and in her opinion she believed Plaintiff was competent to drive "from a visual standpoint." CR 45, Attachment B, pp. 4-9 at ER 201 to 206. Indeed, Plaintiff's eye doctor was instrumental in helping Plaintiff obtain a DOT vision waiver based upon her personal assessment of Plaintiff's condition. See CR 45, Attachment B; at ER 199f; CR 27, pp. 7-9, at ER 20 to 22. In sum, there is evidence which raised a question of fact as to whether Plaintiff could perform the essential function of truck driving.

II. The Lower Court Erred In Holding That No Reasonable Accommodation Was Possible And Specifically That Defendant Was Not Obligated To Accept DOT Vision Waivers.

A. A Question Of Fact Exists As To Whether The DOT Vision Waiver Was A Possible Reasonable Accommodation.

The lower court held that "No reasonable accommodation was possible. `An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job.'" CR 48, Opinion at 7, at ER 218. The lower court stated: "The ADA does not obligate defendant to employ truck drivers who have received vision waivers. The vision waiver program is a

flawed experiment that has not altered the DOT vision requirements." Id.

The term "reasonable accommodation" is an open-ended one. *Schmidt v. Safeway, Inc.*, *supra*, 864 F.Supp. at 996. The statutes and regulations offer examples, but caution that the term is not limited to those examples. Id., citing 42 U.S.C. §12111(9); 29 C.F.R. §1630.2(o); 29 C.F.R. Pt. 1630, App. "An employer may, in appropriate circumstances, have to consider the provision of leave to an employee as a reasonable accommodation, unless the provision of leave would impose an undue hardship." *Schmidt v. Safeway, Inc.*, *supra*, 864 F.Supp. at 996 (citations omitted). Here, one possible reasonable accommodation not given was leave to obtain a vision waiver.

Ordinarily, the reasonableness of an accommodation is an issue for the jury. *Schmidt*, *supra*, 864 F.Supp. at 997; *Hindman v. GTE Data Services*, 3 AD Cases 641, 644 (M.D. Fla. 1994) (question of whether a leave of absence was a reasonable accommodation in order for an employee with a chemical imbalance to receive treatment where there was evidence the individual was able to recover was a question of fact for the jury precluding summary judgment). Here, evidence was adduced which raised a question of fact as to whether the acceptance of a DOT vision waiver would have been a possible reasonable accommodation. As explained below, if Defendant had conducted an individualized assessment of Plaintiff's vision it would have concluded that Defendant's physical impairment affecting his vision did not create an undue safety risk. Historically, Plaintiff had worked for years as a truck driver without incident. Medically, Plaintiff's condition would "not interfere with

his ability to drive." Aff. of Beatrice Michel; CR 27, p. 9, at ER 22. Subjectively, Plaintiff's supervisors believed he was a safe driver based upon direct observation and his performance for Defendant. Given this evidence, and viewing it in the light most favorable to Plaintiff, it cannot be said as a matter of law that "[n]o reasonable accommodation was possible."

B. No Reasonable Accommodation Was Attempted In Lieu Of Accepting The DOT Vision Waiver.

Even if the lower court was correct in holding that Defendant was not required to accept the DOT vision waiver, that does not excuse Defendant of its duty to accommodate Plaintiff's disability.

The ADA imposes upon an employer an affirmative duty to make a reasonable accommodation for its employees' physical impairments. *See* 29 C.F.R. §1630, App. §1630.2(o); *Braun v. American International Health*, 315 Or 460, 470, 846 P.2d 1151 (1993) (interpreting Oregon disability discrimination law, which is also patterned on the Rehabilitation Act, and citing 41 C.F.R. §60-741.6(d) (1992)). Likewise, reassignment is a potentially reasonable accommodation, although in general it "should only be considered when accommodation within the individual's current position would pose an undue hardship." 29 C.F.R. §1630, App., §1630.2(o). Thus, Defendant had an affirmative duty to look for a means to accommodate Plaintiff in his truck driver position and if that proved to be an undue hardship, to consider reassignment.

Below, Defendant cited to its offer of a job as "yard hostler" and later as a "tire man" as attempted reasonable

accommodations. Indeed, Mr. Riddle testified that had Plaintiff not turned down the yard hostler and tire man positions, he would be employed there today. CR 27, p. 101-102; Riddle Depo. 57-58, at ER 112-113.

The problem with Defendant's argument is that Plaintiff never turned down the yard hostler position. CR 27, p. 6; Pl. Aff. Indeed, he thought he had the position. Furthermore, a question of fact was raised as to whether Defendant's asserted explanation for "withdrawing" the offer was pretextual.

Defendant claimed it withdrew the yard hostler offer after Plaintiff did not accept it, implying Plaintiff delayed or was partly responsible for not getting the position. However, evidence exists that Plaintiff did all that was asked of him to assist in getting the position. He called Mr. Riddle, he talked to Mr. Sturgill, he went to the Portland distribution center, he waited there and presented his DOT card when asked for it, and he took the papers given to him home and waited for Defendant's call. CR 27, p. 29-33; Pl. Depo. 77-81; Ex. 41. Although Plaintiff went home, he was never called and never given an explanation as to why he did not get the job. CR 27, pp. 14-33; Pl. Depo. 5, 81.

Defendant argued below that it withdrew the yard hostler position because it became concerned about safety issues since the position required DOT certification. However, evidence was adduced that the nature of the job would not require DOT certification; and, in fact, Plaintiff had the required DOT certification. While discussing the position with Mr. Sturgill, when rudely asked if he had a DOT card, Plaintiff presented it since by that time he had obtained a DOT vision waiver and a valid DOT card. CR 27, p. 30-32; Pl. Depo. 78-80. Furthermore, Mr. Riddle

testified that DOT certification did not have to be required for the yard hostler position. CR 27, p. 97; Riddle Depo. 41.

The yard hostler drives trailers within the confines of the facility and hostlers are not allowed on the road, for the equipment they drive are not road licensed. CR 27, p. 94, 97, 100; Riddle Depo. 27, 41; Sturgill Depo. 31. Indeed, although DOT certification is required by Defendant, it does not have to be for the position is designed so it can be performed within the confines of the yard. Id. at 96-97; Riddle Depo. 40-41. Thus, a question of fact exists as to whether DOT certification was a legitimate requirement and as to whether safety was the motivating concern.

Additional evidence of pretext was adduced that Mr. Riddle was unaware the offer had been withdrawn and had been told Plaintiff rejected it. CR 27, p. 94-100; Riddle Depo. 29, 55.

Regarding the second job discussed with Plaintiff, "tire man," Plaintiff rightfully rejected that offer because he had no experience doing that job, it paid substantially less per hour ($8 - $9, which is $5 - $6 less than what he had been earning) and he did not satisfy an experience requirement. For a reassignment to be a reasonable accommodation, it needs to be "to an equivalent position in terms of pay, status, etc." 29 C.F.R. §1630(2)(o).

As to other job "offers," there is a question of fact as to whether Defendant considered Plaintiff for either a warehouse position or a dispatcher position. Defendant argued it encouraged Plaintiff to apply for a warehouse position, but he failed to pass a qualifying test. However, there was also evidence that other jobs that became available, including warehouse and dispatcher positions,

were not discussed with Plaintiff. CR 27, p. 90-91; Riddle Depo. 22, 23; Cooper Depo. 5, 7.

III. The Lower Court Erred In Holding That Defendant Need Not Make An Individual Assessment Of Plaintiff's Ability To Drive Safely With His Vision Condition.

Defendant relied upon *Chandler v. City of Dallas*, *supra*, to argue that as a matter of law a truck driver with impaired vision who does not meet the DOT requirements in 49 C.F.R. §391.41 cannot be reasonably accommodated because of the inherent safety risk. The lower court erred when it adopted Defendant's argument that no reasonable accommodation existed.

In a post-*Chandler* case, *Sarsycki v. United Parcel Service*, 862 F.Supp. 336 (W.D. Okl. 1994), the court notes that "the *Chandler* holding has been undermined by the fact that the FHWA [Federal Highway Administration] has recently instituted a waiver program for . . . drivers of commercial motor vehicles which the FHWA believes is `consistent with the safe operation' of those vehicles." 862 F.Supp. at 341 (discussing insulin-dependent drivers). As the court notes in *Sarsycki*, "[t]his change in policy was partly a result of an ADA mandate requiring the FHWA to conduct a review of its regulations `in order to ascertain whether the standards conform with the current knowledge about the capabilities of persons with disabilities.'" Id., citing 58 Fed. Reg. 40,693 (1993). Although the court in *Sarsycki* was discussing insulin-dependent drivers, the analysis is equally applicable to the present case and the criticism of *Chandler* equally apt.

The problem with Defendant's safety risk defense, and the lower court's adoption of it is that an "individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices." *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993) (blanket disqualification of individuals with insulin-dependent diabetes as candidates for police officer violates ADA); *accord Anderson v. Little League Baseball, Inc.*, 794 F.Supp. 342, 345 (D. Ariz. 1992) (enjoining the defendant from implementing a policy banning coaches in wheelchairs from the coaches' boxes along the baselines, where an individualized assessment revealed that the plaintiff had successfully served as either a first base or second base coach for three years without incident.)

As the EEOC states in its Technical Assistance Manual:

> The ADA recognizes legitimate employer concerns and the requirements of other laws for health and safety in the workplace. An employer is not required to hire or retain an individual who would pose a "direct threat" to health or safety (see below). But the ADA requires an objective *assessment of a particular individual's current ability* to perform a job safely and effectively. Generalized "blanket" exclusions of an entire group of people with a certain disability prevent such an individual consideration. Such class-wide exclusions that do not reflect up-to-date medical knowledge and technology, or that are based on fears about future medical or workers' compensation costs, are unlikely to survive a legal challenge under the ADA.

* * *

The ADA requires that:

> any determination of a direct threat to health or safety must based on an *individualized* assessment of objective and specific evidence about a particular *individual's* present ability to perform essential job functions, not on general assumptions or speculations about a disability. (See *Standards Necessary for Health and Safety: A `Direct Threat'* below.)

EEOC Technical Assistance Manual, 2 Accommodating Disabilities (CCH) at ¶100.140,

CR 45, Attachment A, p. 3 - 4, at ER 192 to 193. (Emphasis in original).

Thus, even when faced with a perceived safety risk, according to the EEOC an individualized assessment of the impact of each person's disability is necessary. Indeed, the requirement for individualized assessments was one of the reasons for the DOT's waiver program. Federal Register, Vol. 57, No. 58 at 10295. The individualized assessment required under the ADA includes an examination of the individual's history and habits as well as physical attributes that may compensate for or mitigate the effect of the impairment in question. *Fiedler v. American Multi-Cinema, Inc.*, 871 F.Supp. 35, 39-40 (D.D.C. 1994).

Here, if such an individualized assessment of Plaintiff had occurred, a question of fact exists as to whether Defendant would have allowed Plaintiff to continue to

drive, for Mr. Riddle believed that when Plaintiff drove for Defendant he was not a safety hazard. Indeed, Plaintiff has had his same visual impairment since birth and has driven trucks for Defendant and others for years without incident. CR 27, 45-56, 121, 130; Pl. Depo. 150-157, 159-61, 165, 234-235; Ex. 3; Sturgill Depo. 38. Further, Plaintiff's doctor determined his condition would not interfer with his ability to drive. CR 27, p. 9, at ER 22.

Here, Plaintiff adduced evidence that Defendant applied a blanket disqualification of Plaintiff. Mr. Riddle testified that Defendant would accept changes in DOT minimum requirements. However, he also testified that if the DOT said that to accommodate disabled persons Defendant may waive certain of those minimum requirements, it would be unacceptable. CR 27, p. 84; Riddle Depo. at 13. Furthermore, there was no discussion about sending Plaintiff for another exam or getting his history from his doctor. Id. at 128 Sturgill Depo. 58. Having failed to conduct an individualized assessment of the relative safety risks, Defendant was not entitled to judgment as a matter of law on the issue of whether Plaintiff was an otherwise qualified individual with a disability.

It is important to note that Plaintiff is not arguing that all DOT vision waivers had to be accepted by any employer in all cases. Thus, whether or not the DOT vision waiver program was a "flawed experiment," as the lower court held, is really not in issue. Plaintiff's position is that a reasonable accommodation in Plaintiff's particular case, given his vision condition, would have been to accept the DOT vision waiver, since he could safely drive a truck and had proven over a number of

years that he could; and, that under the ADA the determination of whether Plaintiff could safely drive a truck required an individualized assessment of his condition and abilities in order to avoid unlawful discrimination on account of that condition. Since there is evidence that Defendant failed to conduct that individualized assessment, a question of fact exists as to whether Defendant failed to reasonably accommodate Plaintiff's vision impairment.

IV. The Lower Court Erred In Holding That Defendant Was Not Required To Make A Reasonable Accommodation By Transferring Plaintiff To A Truck Hostler Position Or Some Other Position In Lieu Of Termination When Plaintiff Already Had A State Statutory Right To Reinstatement As An Injured Worker. The Issue Thus Became Whether Reasonable Accommodation Could Have Facilitated Plaintiff's Return.

In the present case, there was additional reason why Defendant had an affirmative duty to offer a suitable reassignment and make reasonable accommodation in that new position. Here, Plaintiff was an injured worker. As an injured worker, once Plaintiff was released to work he was entitled to his old job or a suitable alternative if his old job was not available. ORS 659.415; ORS 659.420. It is in that context that we must examine whether Defendant reasonably accommodated Plaintiff to facilitate that return.

Plaintiff was released unconditionally to work on November 3, 1992. CR 27, p. 37, 59, 141-142; Pl. Depo.

91, 252; Ex. 29. However, instead of returning Plaintiff to work, Defendant sent him to its doctor for an examination, which revealed he had 20/200 vision in his left eye and needed a DOT vision waiver. CR 27, pp. 38-40, 132; Pl. Depo. 92, 94, 95; Ex. 17. As a result of that examination, Defendant's own doctor, Dr. Douglas Eubanks, stated that Plaintiff needed a "vision waiver," not that he should not drive. CR 27, p. 40; Pl. Depo. 95. Thus, at the time Defendant learned of Plaintiff's physical disability that required reasonable accommodation it also had a legal obligation to return him to his former position or a suitable alternative. Since Defendant was subject to both legal obligations at the same time it had a legal obligation to make reasonable accommodation so Plaintiff could return to his job as a truck driver or to offer him reasonable accommodation in a suitable alternative position as a disabled injured worker.

In denying Plaintiff's motion for reconsideration, the lower court assumed for purposes of the motion that reassigning Plaintiff to a vacant position was a possible reasonable accommodation. However, the court held that Plaintiff had not shown the yard hostler position was vacant at the time of termination and even if it was, driving was still an essential function of the job. Order, p. 2; CR 53 at ER 224. Contrary to the lower court's holding, evidence was adduced that the "yard hostler" position was vacant. *See* factual discussion, *supra*, at 8-9. Indeed, Mr. Riddle testified that had Plaintiff not turned down a "yard hostler" position he would still be employed by Defendant. Riddle Depo. 57-58, CR 27 at ER 101-102. Furthermore, Plaintiff denied ever turning down the position. For purposes of summary judgment, that dispute is sufficient to raise a question of fact as to

whether or not the position was vacant.

Defendant's personnel manager did not know of any undue hardship to Defendant that would have existed by accepting a vision waiver. CR 27, pp. 69-71, 74; Norris Depo. 6, 7, 8, 24. Mr. Sturgill believed the undue hardship to be the "liability" presumably attendant thereto. In the absence of any undue hardship and of an individualized assessment of the safety risks, Defendant could not avoid its reasonable accommodation requirement by simply refusing to accept the DOT vision waiver on such generalized and stereotypical grounds.

Furthermore, evidence was adduced that raises a question of fact as to whether DOT certification was required for the yard hostler position since the position was designed so it could be performed within the confines of the yard. Riddle Depo. 41; CR 27, pp. 96, at ER 107. Testimony by Defendant's management raises a question of material fact as to whether the proposed accommodation of the yard hostler position would have been futile.

Therefore, the court erred in holding there was no requirement that Defendant reasonably accommodate Plaintiff in the yard hostler position, or in some other suitable alternative position.

CONCLUSION

The district court erred in granting Defendant's motion for summary judgment on Plaintiff's ADA claim. This Court should reverse the district court and remand this case for further proceedings.

DATED this 27 day of August, 1996.

Respectfully submitted,

s/ Richard C. Busse
RICHARD C. BUSSE, OSB #74050

s/ Scott N. Hunt
SCOTT N. HUNT, #92343
Of Attorneys for Plaintiff-Appellant

(Statement of Related Cases and Certificate of Service omitted in printing)

(Caption omitted in printing)

ANSWERING/OPENING BRIEF OF DEFENDANT/APPELLEE

Appeal from the United States District Court
for the District of Oregon

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STATEMENT OF JURISDICTION

1. Basis For District Court Subject Matter Jurisdiction

The United States District Court for the District of Oregon had federal question jurisdiction over Plaintiff's disability claim brought under the Americans with Disabilities Act, 42 USC §12101, et. seq. (hereafter "ADA"), pursuant to 28 USC §1331 and 28 USC §1343(a)(4).

2. Basis for Ninth Circuit Court of Appeals Jurisdiction

Pursuant to 28 USC §1291, this Court has jurisdiction over the final decision of the United States District Court for the District of Oregon.

3. Date of Entry of Judgment and Order

Plaintiff is appealing from the Opinion and Order entered in this action on October 25, 1995, and from the Order denying reconsideration entered November 9, 1995, and from the Judgment of Dismissal entered on December 15, 1995. Appellant's Excerpts of Record (hereafter "E.R.") 211-20; 223-5; 226. Appellee Albertsons accepts the remainder of Appellant's statements regarding procedural history.

ATTORNEYS' FEES

Pursuant to 42 USC §12205, Appellee Albertsons respectfully requests this Court grant it reasonable attorney's fees, litigation expenses, and costs if the Court affirms the lower court's decision.

STANDARD OF REVIEW

The Court's review of an Order granting Summary

Judgment is *de novo*. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995) (citing Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). The Court must first determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law. Id. Summary judgment is proper against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex v. Catrett, 477 U.S. 317, 322, 91 L. Ed.2d 265, 106 S. Ct. 2548 (1986). The moving party is entitled to a judgment as a matter of law when there is no genuine issue as to any material fact. Id. (citing Federal Rules of Civil Procedure 56(c)).

STATEMENT OF THE CASE

Albertsons hired Plaintiff as a truck driver at the Portland, Oregon Distribution Center on August 21, 1990. Kirkingburg Dep. Exhibit 6, Appellee's Supplement Excerpt of Record (hereafter "Supp. E.R.") 29. On December 3, 1991, Plaintiff fell from a truck while on the job and injured his head, hand, and shoulder. Kirkingburg Dep., p. 37, 91, E.R. 37, 50. Plaintiff was off work due to the injury until he was released to return to work in November of 1992. Kirkingburg Dep., p. 91, E.R. 50.

All over the road truck drivers are required by the federal government to be certified as medically competent to drive. 49 CFR §391.41(a). While Plaintiff was an employee of Albertsons, he was certified twice by two different medical examiners. In regard to vision standards, Department of Transportation (hereafter "DOT") regulations require a minimum acuity score of 20/40 corrected in each eye. Sturgill Dep. Exhibit 34, E.R. 157.

Although Plaintiff's medical examination on August 18, 1990 revealed Plaintiff had acuity ratings of 20/25 vision in

the right eye and 20/70 (a failing grade) in the left eye, the medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations, 49 CFR §391.41-391.49. Sturgill Dep. Exhibit 22, E.R. 146. Plaintiff's medical examination form of February 5, 1991, showed Plaintiff had acuity ratings of 20/25 vision in the right eye and 20/100 (a failing grade) in the left eye, yet once again a medical examiner certified that Plaintiff met the requirements under the Motor Carrier Safety Regulations. Sturgill Dep. Exhibit 23, E.R. 147.

Plaintiff testified that he was born with vision in his left eye of 20/200 and that it has not changed. Kirkingburg Dep., pp. 43, 95, 103-4, 275, 287; Supp. E.R. 2, 8-10,19, 20. Albertsons historically has deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards. Jardine Affidavit ¶4, Supp. E.R. 68-69; Sturgill Dep. pp. 24, 34, Supp. E.R. 46, 47.

Albertsons' company policy requires that all drivers are recertified (DOT certification) when they return from a long term injury. Sturgill Dep. pp. 49, 52-3, Supp. E.R. 48-50; Riddle Dep. p. 30, Supp. E.R. 55. Thus, when Plaintiff returned from his nearly one year medical absence, Albertsons asked him to recertify with a physical examination from the Eubanks clinic on November 6, 1992. Sturgill Dep. p. 49, Supp. E.R. 48; Riddle Dep. p. 30, Supp. E.R. 55. Dr. Douglas Eubanks, D.O., examined Plaintiff and correctly found his acuity rating to be 20/20 in the right eye and 20/200 (a failing grade) in the left eye. E.R. 143. Dr. Eubanks found that Plaintiff failed to meet the minimum vision requirements under DOT standards and so advised Albertsons' Transportation Department on November 6, 1992. E.R. 143; Sturgill Dep. Exhibit 34, E.R. 157.

At all times, Plaintiff, insisted on returning to work as a driver. Norris Dep. pp. 17-18, Supp. E.R. 41-42. Albertsons' consistent policy has been only to employ drivers who meet or

exceed the minimum DOT standards. King Affidavit ¶4, Supp. E.R. 66-67; Jardine Affidavit ¶5, Supp. E.R. 69; Riddle Dep. pp. 11-13, 60, Supp. E.R. 52-54, 62. Albertsons has never accepted DOT waivers. King Affidavit ¶3, Supp. E.R. 66; Jardine Affidavit ¶3, Supp. E.R. 68.

While Albertsons did not believe Plaintiff was otherwise qualified to drive a commercial vehicle, it did consider plaintiff for and offered to Plaintiff other jobs. King Affidavit ¶5, Supp. E.R. 67. After terminating Plaintiff's employment, Albertsons offered Plaintiff the positions of Yard Hostler (moving trailers at the Distribution Center) (Kirkingburg Dep. p. 77; Supp. E.R. 3) and Tire Man. Kirkingburg Dep. pp. 84-85; Supp. E.R. 4-5. When Albertsons realized that the Yard Hostler position also required DOT certification, the Company withdrew the offer before it was accepted. Riddle Dep. p. 55, Supp. E.R. 60. Plaintiff refused the Tire Man position. Kirkingburg Dep. 85-87, Supp. E.R. 5-7, Norris Dep. p. 18, Supp. E.R. 42. General Manager of the Distribution Center Frank Riddle and Corporate Labor Relations personnel decided to terminate Plaintiff from his job as a commercial truck driver. Riddle Dep. pp. 11-12, Supp. E.R. 52-53. Mr. Riddle reviewed Plaintiff's DOT file before terminating him. Id. Plaintiff's DOT file showed he did not meet the DOT minimum requirements of the DOT manual. Id. Additionally, Albertsons' Driver Manual states, "As an Albertson's driver, you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Riddle Dep. Exhibit 2, Supp. E.R. 63-65. Under these standards, Plaintiff should never have been allowed to drive for Albertsons at all. *See* 49 CFR §391.41(a), (b)(10).

Albertsons issued a policy statement on June 4, 1993, reinforcing its policy for driver compliance with all DOT and company safety rules, "Albertson's owes it to its customers, employees and the public to have the safest possible driver workforce . . . We should continue to apply the minimum

standards of the DOT to applicants and employees. In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate the driver in ways other than a DOT minimum qualification waiver." Sturgill Dep. Exhibit 43, E.R. 170. Albertsons has never accepted waivers from DOT minimum requirements because of concern for the safe operation of its vehicles. Riddle Dep. pp. 13, 60, Supp. E.R. 54, 62; Jardine Affidavit ¶3, Supp. E.R. 68.

Frank Riddle directed Theodore Sturgill, the Transportation Manager, to terminate Plaintiff's employment because he did not meet the minimum DOT requirements. Sturgill Dep. pp. 22-24, Supp. E.R. 44-46. Transportation Manager Ted Sturgill, and Personnel Manager Charles Norris terminated Plaintiff's employment with the Company on November 20, 1992 for failing the DOT physical. Kirkingburg Dep. Exhibit 9, pp. 1-2, Supp. E.R. 30-31. Plaintiff obtained a vision waiver from DOT[1] on February 2, 1993. Sturgill Dep. Exhibit 36, E.R. 160. Employers have never been required to accept vision waivers.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court properly granted Summary Judgment finding there were no genuine issues of material fact; Plaintiff was not a qualified individual with a disability under the Americans with Disabilities Act because he could not perform the essential functions of driving a commercial

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[1]The experimental vision-waiver program was invalidated August 2, 1994. Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The court found the Federal Highway Administration (FHWA) adopted the waiver program contrary to law. Id. The FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. Id. See discussion infra, p. 25-26.

vehicle.

2. Whether the District Court properly held that no reasonable accommodation was possible and specifically that Defendant was not logically obligated to accept Department of Transportation vision waivers of minimum acuity ratings.

3. Whether the District Court properly held that Defendant could rely on Department of Transportation vision standards and need not make an individual assessment of Plaintiff's ability to drive a commercial vehicle.

4. Whether the District Court properly held that Defendant was not required to make a reasonable accommodation by transferring Plaintiff to a Yard Hostler position or some other available and suitable position.

SUMMARY OF THE ARGUMENT

Plaintiff was not an "otherwise qualified" individual with a disability under the ADA because he could not perform the essential functions of driving a commercial truck. The ADA's affirmative duties on an employer to "reasonably accommodate" are only required when an individual meets the threshold test of being a qualified individual with a disability. Plaintiff did not meet the minimum vision requirements for DOT certification to drive a commercial vehicle. DOT certification and the DOT vision requirements are linked together. Without meeting the minimum DOT requirements, Plaintiff was not DOT certified, which is the Federal requirement to drive a commercial truck safely. The DOT requirements for commercial truck drivers provide both the driver and the public with protection from the substantial risk of harm of allowing unqualified drivers to operate over the road trucks on the highways. Plaintiff was unqualified to perform the essential functions of driving a commercial truck safely.

Moreover, Albertsons was not legally required to accept a DOT vision waiver. Albertsons has the right to rely on

established Federal safety standards and should not be required to participate in an experimental study that waives vision requirements for commercial drivers. Without a legal obligation to accept vision waivers, Albertsons was under no legal duty to conduct an "individual assessment" of Plaintiff's abilities. To require Albertsons to conduct an "individual assessment" would be an exercise in futility because Plaintiff did not and could not meet the minimum Federal safety standards. To require employer participation in an experimental study would risk the safety of the drivers and the public. Further, to require Albertsons to accept substandard qualifications would subject it to the risks of liability presented by employing a driver who is below minimum standards set out by Federal law.

Albertsons offered Plaintiff alternative employment opportunities that became available, although it was not legally obligated to "reasonably accommodate" him.[2] Significantly, Plaintiff rejected at least one such offer of employment. Even if Albertsons were under a duty to accommodate in this case, it would not be required under the ADA to offer or give the employee the position of his choice.

The District Court for the District of Oregon granted Summary Judgment in favor of Albertsons. The court examined all the evidence in light of the non-moving party, Plaintiff, and found no genuine issues as to any material facts were presented. The court properly held as a matter of law in favor of Albertsons' Motion for Summary Judgment.

ARGUMENT

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[2]Note that even if Albertsons had been so legally obligated, that obligation was only to accommodate Plaintiff to permit him to succeed in "the position" he had held or had applied for. 42 USC §12111(8) ("ADA"). When Albertsons offered Plaintiff positions other than over the road truck driver, the Company exceeded its legal obligations.

I. Whether The District Court Properly Granted Summary Judgment Finding There Were No Genuine Issues of Material Fact; Plaintiff Was Not a Qualified Individual With a Disability Under The Americans With Disabilities Act Because He Could Not Perform The Essential Functions of Driving a Commercial Vehicle.

Plaintiff brought his action against his former employer Albertsons claiming disability and perceived disability discrimination based upon his visual impairment under the ADA, 42 USC §12101, et. seq. The ADA prohibits employers from discriminating in the terms, conditions, and privileges of employment against a qualified individual with a disability. 42 USC §12112(a).

For Plaintiff to present a prima facie case under the ADA, he must show that (1) he is a disabled individual; (2) he is qualified, that is, he can perform the essential functions of the job with or without reasonable accommodation; and (3) defendant terminated him because of his disability. Lucero v. Hart, 915 F.2d 1367, 1371 (9th Cir. 1990) (prima facie elements under Rehabilitation Act, which the ADA patterns); *see also* Schmidt v. Safeway, Inc. 864 F. Supp. 991, 996 (D. Or. 1994).

A. Plaintiff was not a "qualified individual" with a disability.

Albertsons moved and the District Court properly held as a matter of law that Plaintiff was not a "qualified individual" with a disability. Opinion p. 7, E.R. 218. Plaintiff failed to show any genuine issues of fact that he is a "qualified individual" with a disability. A "qualified individual with a disability means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual

holds or desires." 42 USC §12111(8).

The statutory definition of "qualified individual" is further clarified by regulations promulgated by the Equal Employment Opportunity Commission (hereafter "EEOC"). Under the EEOC regulations, determining whether a person is a "qualified individual with a disability" follows a two-step analysis. Appendix to 29 CFR §1630.2(m). The first step is to determine whether the person satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc. Id. (emphasis added). The second step is to determine whether the individual can perform the essential functions of the position with or without reasonable accommodation. Id. (emphasis added). The determination should be based on the capabilities of the individual with a disability at the time of the employment decision. Id. Plaintiff bears the burden of demonstrating that he can perform the essential function of his job with or without reasonable accommodation. Lucero at 1371.

Plaintiff failed to satisfy the prerequisite minimum vision requirement for the position of a commercial vehicle truck driver, thus failing to meet his burden of showing in the first step of the analysis that he was a "qualified individual with a disability". The minimum vision requirements established by DOT for operators of commercial motor vehicles include,

> "distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses ***." 49 CFR §391.41(b)(10).

On November 9, 1992, Dr. Douglas Eubanks found Plaintiff's acuity rating to be 20/200 in his left eye. Sturgill Dep. Exhibit 17, E.R. 143. The doctor noted that this had been Plaintiff's corrected vision rating in that eye "since birth". Id.

Plaintiff's medical examinations reveal that he has never met the minimum DOT vision requirements to drive a commercial vehicle, although various examiners wrongly "certified" him as DOT "qualified". Sturgill Dep. Exhibit 16, E.R. 142; Sturgill Dep. Exhibit 21, E.R.145; Sturgill Dep. Exhibit 22, E.R. 146; Sturgill Dep. Exhibit 23, E.R. 147.

Plaintiff's brief paints Albertsons' request for recertification by medical exam as one with ulterior motives. The facts are far less exciting than Plaintiff imagines them. Albertsons treated plaintiff like any other driver returning from a long term injury, when it asked him to recertify. Sturgill Dep., pp. 52-53, Supp. E.R. 49-50; Riddle Dep. p. 30, Supp. E.R. 55. Albertsons' longstanding practice and policy has been to request drivers to recertify when they return from a long term injury. Sturgill Dep., pp. 52-53, Supp. E.R. 49-50; Riddle Dep. p. 30, Supp. E.R. 55. Plaintiff returned to work after an absence of nearly a year due to a compensable injury. *See* Kirkingburg Dep. pp. 37, 91, E.R. 37, 50. Therefore, when he returned from the injury he admitted that Albertsons asked him to recertify. Kirkingburg Dep. pp. 91-92, E.R. 50-51.

Dr. Douglas Eubanks brought it to Albertsons' attention that Plaintiff did not qualify under the DOT vision requirements. This was the first time that Dr. Douglas Eubanks examined Plaintiff. Kirkingburg Dep. p. 94, E.R. 52. At all times before, other doctors examined Plaintiff and filled out the certification card erroneously.[3] There is no evidence in the record that Dr. Douglas Eubanks was anything other than

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[3]On April 26, 1988, Dr. Gayle Sayler certified Plaintiff, having found right eye acuity of 20/15 and left eye acuity of 20/200. Sturgill Exhibit 21, E.R. 145. August 18, 1990, Robert Eubanks, D.O., certified Plaintiff with right eye acuity of 20/25 and left eye acuity of 20/70. Sturgill Exhibit 22, E.R. 146. February 5, 1991, Dr. Theresa Eubanks certified Plaintiff with right eye acuity of 20/25 and left eye acuity of 20/100. Sturgill Exhibit 23, E.R. 147.

more careful than previous physicians.

Plaintiff's arguments do not alter DOT vision requirements of corrected vision of at least 20/40 in each eye without corrective lenses or visual acuity separately corrected to 20/40 or better with corrective lenses. *See* 49 CFR §391.41(10). As the examining physician, Dr. Douglas Eubanks found Plaintiff did not meet the Motor Carrier Safety Regulations. Kirkingburg Dep. Exhibit 17, E.R. 143. It is undisputed that Plaintiff does not meet the prerequisite minimum standard set by DOT regulation, which has been in effect at all material times in this case. He confuses the issue of prerequisites in his opening brief. He argues that the DOT certification is the prerequisite to the position and not the physical vision requirements set by DOT. Plaintiff misses the fact that the DOT certification and the physical vision requirements set by DOT are intertwined: without meeting the minimum vision requirements, one is not DOT certified; to be DOT certified, one is required to meet or exceed the minimum vision requirements.

When Dr. Douglas Eubanks found that Plaintiff failed to meet the minimum vision requirements under DOT standards, he so advised Albertsons' Transportation Department on November 6, 1992. E.R. 143; Sturgill Dep. Exhibit 34, E.R. 157. Thus, Plaintiff failed to meet the minimum vision requirements and was not eligible for DOT certification as required by 49 CFR §391.41(b)(10). The only exceptions to DOT requirements have been instituted through the experimental waiver program study of the Federal Highway Administration.[4]

Plaintiff was unable to perform the essential functions of the position with or without reasonable accommodation and thus failed the second step of analysis as to whether he is a

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[4]The waiver program was experimental, and Albertsons should not be required to adopt it. *See* Discussion at II, infra. p. 24.

"qualified individual with a disability". "Essential functions" are the fundamental job duties of the employment position the individual with a disability holds or desires. 29 CFR §1630.2(n). Essential functions of the job are those functions that bear more than a marginal relationship to the job at issue. Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). Evidence of whether a function is essential include (1) evidence of the employer's judgment as to which functions are essential and (2) written job descriptions. 42 USC §12111(8). In weighing whether a function is essential, the EEOC further considers, but does not limit itself to: whether the position exists to perform a particular function, the amount of time spent on the job performing the function, and the consequences of not requiring the incumbent to perform the function. 29 CFR §1630.2(n). In this case, Plaintiff worked for Albertsons as an over-the-road truck driver of a commercial motor vehicle.

The essential function and purpose of the position is driving to transport groceries and other goods between states. The potential consequences of not requiring the incumbent over-the-road driver to conform to minimum standards are danger to the public and grave liability to the Company. *See discussion regarding* Chandler v City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994), *infra. p. 18.* Thus, the accommodation sought by Plaintiff here (acceptance of a waiver of minimum safety standards) was not reasonable. Id.

The District Court properly gave weight to Albertsons' judgment as to what functions of Plaintiff's job are essential. 42 USC §12111(8). *See* Riddle Dep., Exhibit 2, p. 3, Supp. E.R. 65. The Company Driver Manual clearly states, ". . . you are required to comply with all Department of Transportation, Interstate Commerce Commission and Company safety rules." Riddle Dep. Exhibit 2, p. 3, Supp. E.R. 65. Albertsons considers the DOT minimum requirements for interstate truck driving an essential requirement to perform the function of

interstate driving. Affidavit of Jardine ¶¶2, 5, Supp. E.R. 68-69; Affidavit of King ¶¶2, 4, Supp. E.R. 66-67. The District Court found that Albertsons acted properly when it considered meeting DOT minimum requirements essential to Plaintiff's job of interstate truck driving. Court Opinion p. 7, E.R. 218.

The Fifth Circuit has applied a two part inquiry to determine whether an individual is "otherwise qualified" for a given job under the Rehabilitation Act of 1973[5]. Chandler v. City of Dallas, 2 F.3d 1385, 1393 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). The burden lies with the plaintiff to show that he is otherwise qualified. Chandler at 1394. The first inquiry is whether the individual could perform the essential functions of the job. Id. at 1393. Under Etheridge v. State of Alabama, 860 F.Supp. 808 (M.D. Ala. 1994) (ADA claim), the Alabama District Court followed the first inquiry by determining if the individual satisfied the requisite skill, experience, education and other job-related requirements of the employment position. Etheridge at 818 (citing 29 CFR §1630.2(m)).

"Essential functions" are defined as the fundamental job duties of the employment position the individual with a disability holds or desires. 29 CFR §1630.2(n). Further, "essential functions" are those that an employee must be able to perform. Etheridge at 816. The function may be essential because the reason the position exists is to perform that function. 29 CFR § 1630.2(n)(2)(i). Evidence of whether the particular function is essential includes, but is not limited to, the employer's judgment as to which functions are essential. 29 CFR §1630.2(n)(3)(i). The District Court properly held that Albertsons was legally entitled to consider meeting DOT minimum requirements essential to Plaintiff's job. E.R. 218.

The second inquiry of Chandler is only reached if the

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[5] Congress intended that the case law established under the Rehabilitation Act be used in deciding ADA cases. 42 USC §12117(b).

Court concludes the individual could not perform the essential functions of the job. Chandler at 1393. That inquiry is whether any reasonable accommodation would enable the individual to perform the essential functions of the job. Id. at 1393-1394. There were no possible reasonable accommodations that would have allowed Plaintiff to perform the essential functions of driving a commercial vehicle. *See* discussion at II, infra.

B. Plaintiff failed to produce any material issue of fact that he was a "disabled individual" as defined under the first prong of the ADA.

Although not addressed directly by court below, Plaintiff must first establish that he is "disabled" within the meaning of the ADA. A "disability" means a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment. 29 CFR §1630.2(g)(1)-(3) (emphasis added). Plaintiff failed to bring forward any material issues of fact that he is substantially limited in the major life activity of working or seeing.

With respect to the major life activity of *working*, according to the EEOC, "substantially limited" in a major life activity means,

> "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 CFR §1630.2(j)(3)(i).

Plaintiff admits his visual acuity has always been 20/200 in his left eye. Kirkingburg Dep., p. 43, Supp. E.R. 2; Kirkingburg Affidavit ¶ 2, E.R. 18. Historically, his vision condition has

never prevented him from the major life activity of working.[6] Kirkingburg Dep., p. 46, E.R. 38.

"The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 CFR §1630.2(j)(3)(i). Plaintiff must show and demonstrate that he is disabled in a more general sense than an inability to return to a particular job and that the limitations substantially impair the major life activity of working to establish his prima facie case under the ADA. Bolton v. Scrivner, Inc., 36 F.3d 939, 943 (10th Cir. 1994), cert. denied, 115 S. Ct 1104 (1995). At the district court level in Bolton, the court drew the analogy,

> "[T]he mere fact that the average person on the street could not play fullback on the New York Giants without some assistance does not mean that he or she is handicapped as defined by the ADA." Bolton v. Scrivner, Inc., 836 F.Supp. 783, 788 (W.D. Okl. 1993).

Thus, because Plaintiff was able to perform many other jobs with his lifelong vision deficiency, he was not legally "disabled" from working.

Likewise, Plaintiff failed to bring forward any evidence that his major life activity of seeing was substantially limited. Plaintiff did present evidence showing that he was visually

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[6]Plaintiff trained and worked as a jet aircraft mechanic and crew chief to the basic air commander (1957-60), worked as an auto mechanic for Los Angeles County (1968-78 or 1979), worked as a employee truck driver and independent truck driver (approximately 1974-81), obtained a contract with the county as a garbage hauler (approximately 1981-1989), and worked as a truck driver for Pastega Trucking (1990). Kirkingburg Dep. pp. 12-13, E.R. 30-31; p. 149, E.R. 57; pp. 151,154. E.R. 59, 62; pp. 156-157, E.R. 64-65; pp. 161-162, E.R. 68-69.

impaired with monocular vision.[7] Michel Dep. p. 27, E.R. 208. However, he failed to present any evidence that he was substantially limited in the major life activity of seeing. "Substantially limited" means "unable to perform a major life activity that the average person in the general population can perform." 29 CFR §1630.2(j). Factors considered in weighing whether an individual is "substantially limited" include: the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or expected permanent or long term impact of or resulting from the impairment. 29 CFR §1630.2(j)(2)(i)-(iii). Plaintiff failed to bring forward any evidence that his vision prevented him from activities an average person can perform (except safely driving a big truck in interstate commerce). Nor did he present testimony as to the nature or severity of the impairment, other than establishing that he had visual acuity of 20/200 (with corrective lenses) in his left eye, which he claims he has had since birth. Kirkingburg Dep., p. 43, Supp. E.R. 2; Kirkingburg Affidavit ¶2, E.R. 18; Sturgill Dep. Exhibit 17, E.R. 143. Plaintiff's right eye was found to be 20/20 with corrective lenses. Sturgill Dep. Exhibit 17, E.R. 143.

Plaintiff, in his opening brief, cites three cases to support his argument that he was a "disabled" individual. Plaintiff Br. pp. 12-13. Each of these three cases is distinguishable from this case because each plaintiff in those cases was substantially impaired in both eyes.[8] Plaintiff is not.

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[7]Significantly, under 49 CFR §391.43 ( ), medical examiners are specifically instructed that, "Monocular drivers are not qualified to operate commercial motor vehicles under existing Federal Motor Carrier Safety Regulations."

[8]Plaintiff argues under the Rehabilitation Act a "legally blind" individual is a "handicapped individual". Plaintiff Br. pp. 12-13. He relies on Norcross v. Sneed, 573 F.Supp. 533 (W.D. Ark. 1983), aff'd, 556 F.2d 184 (8th Cir.), although that individual was legally blind in both eyes. Plaintiff also cited Gurmankin v. Costanzo, 411 F.Supp. 982 (E.D. Pa. 1976, aff'd, 556 F.2d 184 (3d Cir. 1977) (individual was blind) for the proposition that a blind person is a handicapped person under the Rehabilitation Act. There is no evidence that Mr. Kirkingburg is "blind". Finally, he relied on Sharon v. Larson, 650 F.Supp. 1396 (E.D. Pa. 1986), although that individual's vision was 20/120 in the right eye and 20/300 in the left eye with conventional corrective lenses and the best combined acuity with conventional lenses was 20/100. Further, in Sharon there was no dispute (between parties) whether that plaintiff was handicapped, and the principal issue focused on whether Plaintiff was "otherwise qualified" to meet the state's minimum vision requirements for a driver's license. Id. at 1398, 1401.

In the case at hand, there is no dispute that Plaintiff had terrible vision in his left eye. However, no expert testimony was given to indicate that Plaintiff was "legally blind". His vision in his right eye is not "legally blind" at 20/20 with corrective lenses, not to mention that his combined acuity -- while deficient under DOT standards -- was never "legally blind". *See* Sturgill Dep. Exhibit 17, 143. Plaintiff did not assert and brought forward no evidence to show a substantial limitation of the "major life activities" of seeing. Therefore, Plaintiff was not "disabled" as defined under the ADA.

II. Whether the District Court Properly Held That No Reasonable Accommodation Was Possible and Specifically That Defendant Was Not Legally Obligated to Accept Department of Transportation Vision Waivers of Minimum Acuity Ratings.

A. Allowing Plaintiff a leave of absence to obtain a DOT vision waiver or requiring Albertsons to accept the DOT waiver would not be a reasonable accommodation.

Plaintiff argues that Albertsons should have reasonably accommodated him by allowing him a leave of absence to obtain a vision waiver. Assuming *arguendo* that Plaintiff was a qualified individual with a disability who with or without reasonable accommodation could perform the essential functions of the job --which he was not-- the ADA does not require an employer to accept a vision waiver.

Plaintiff argues that he should have been granted leave to obtain a vision waiver and Albertsons should have accepted the waiver and
considered him "qualified" to drive by virtue of his eligibility to participate in the FHWA experimental study. To accept such argument would wrongly require an employer to take part in an FHWA experimental study, at the risk of harm to itself and to the traveling public. Nothing in the ADA requires an employer to become an unwilling participant to such an experiment.

In fact, the experimental vision-waiver program was invalidated and vacated on August 2, 1994. Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The FHWA had adopted the waiver program contrary to law. Id. The court found that FHWA failed to determine that a waiver was consistent with the safe operation of commercial motor vehicles. Id.

On February 28, 1992, the FHWA published an "advance notice of proposed rulemaking," inviting public comment on "the need, if any, to amend its driver qualification requirements relating to the vision standard," 57 Fed. Reg. 6793. On March 25, 1992, before the time for public comment had expired, the FHWA announced the implementation of a temporary vision waiver program for certain drivers, including those who were blind in one eye. 57 Fed. Reg. 10295. Following heavy criticism, the agency published a third notice inviting public comment "on its intent to waive its vision requirements for drivers that meet certain conditions," and stating that

> "the proposed waiver program will enable the FHWA to conduct a study comparing a group of experienced visually deficient drivers with a control group of experienced drivers who meet the Federal vision requirements." 57 Fed. Reg. 23370 (June 3, 1992).

Subsequently, the FHWA instituted the program to issue temporary waivers. 57 Fed. Reg. 31458 (July 16, 1992).

In Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994) the federal Court of Appeals for the District of Columbia Circuit threw out the FHWA waiver program. The court held that the agency violated its mandate to grant waivers from established physical qualification standards only where it found that such waivers were "not contrary to the public interest and *** consistent with the safe operation of commercial motor vehicles." 28 F.3d at 1293, citing 49 USC App. §2505(f). The court noted that the FHWA admitted (in its final notice implementing the waiver program) that it had no empirical data "to establish a link between vision disorders and commercial motor vehicle safety," and that the waiver program itself was intended to provide this data by allowing the agency to conduct a study that would

> "provide the empirical data necessary to *** permit the FHWA to properly evaluate its current vision requirements *** and, if necessary, establish a new vision requirement ***." 57 Fed. Reg. at 31458.

The FHWA proposed the waiver program as an experiment to see how safe (or unsafe) drivers who did not meet the current vision standards in 49 CFR §391.41(b)(10) might be.

On November 17, 1994, the FHWA published a "Notice of Final Determination and change in research plan." 59 Fed. Reg. 59386 (emphasis added.) This notice continued existing temporary waivers until March 31, 1996, subject to certain

reporting and monitoring conditions for maintaining the waivers. In this notice, the FHWA acknowledged that its vision waiver "study as presently fashioned has some problems *** [and] that its group of waived drivers may include some subpar performers who individually may present an unacceptable risk to safety." Id. at 59388. In particular, the FHWA admitted that problems with monitoring of the study led to under reporting of the number of fatal accidents involving drivers with vision waivers, and in fact the rate of fatal accidents for this group had been higher than previously believed. Id. at 59388-89. The agency also conceded that "the study, as currently designed, will not produce, by itself, sufficient evidence upon which to develop a new vision standard" to replace the current one in 49 CFR §391.41(b)(10). Id. at 59388. In fact, the agency stated that the original vision standard (relied on by Albertsons) would remain in effect until the completion of the research and the implementation of any new standard. Id. at 59390.

Plaintiff has suggested that a leave of absence would be a reasonable accommodation (citing Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D. Or. 1994)). Plaintiff Br. p. 18. Plaintiff misses the critical analysis on which the plaintiff in Schmidt focused. The plaintiff in Schmidt requested a leave of absence while he underwent treatment for his alcoholism. Id. at 997 (emphasis added). In the case at hand, Plaintiff's physician stated by letter to DOT,

> "The reduced acuity in the left eye is due to amblyopia (ICD-9 368.0). Amblyopia is low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease." Sturgill Dep. Exhibit 24, E.R. 148. (Emphasis added.)

The record reflects no evidence and there is no dispute that Plaintiff's condition is uncorrectable and not treatable.

Plaintiff essentially argues that Albertsons should accept

his waiver of the federally mandated requirements as outlined in 49 CFR §391.41(b)(10). Under Buck v. United States Department of Transportation, 56 F.3d 1406, 1408 (D.C. Cir. 1995) (Rehabilitation Act did not require FHWA to perform individual assessments of truck drivers who failed DOT hearing requirements), the Court found that when the Federal Highway Administration established certain safety standards and there was no way an individual with a certain handicap could meet the standard, the law did not require the pointless exercise of allowing him to try (to meet the standard). Buck at 1408. "Once an individual has admitted that he does not meet such a necessary - as opposed to a merely convenient - standard, the Rehabilitation Act does not forbid the application to him of a general rule." Id.

To hold that Albertsons would be required to allow Plaintiff leave to obtain a waiver would be an exercise in futility since he could not meet the minimum vision requirements even with the waiver. The District Court correctly pointed out if Albertsons were required to accept the DOT waivers, in the event of an accident, it would be put in the indefensible position of justifying the decision of allowing a driver who did not meet the minimum vision requirements to drive a commercial vehicle. E.R. 218-219. The Fifth Circuit has held, as a matter of law, that a driver with insulin dependent diabetes or with vision that is impaired to the extent discussed in 49 CFR §391.41 presents a substantial risk that he could injure himself or others. Chandler v. City of Dallas, 2 F.3d 1385, 1395 (5th Cir. 1993), cert. denied, 114 S.Ct. 1386 (1994). "Woe unto the employer who put such an employee behind the wheel of a vehicle owned by the employer which was involved in a vehicular accident." Id. at 1395 (quoting Collier v. City of Dallas, No. 86-1010, slip op. at 3 (5th Cir. 1986) (unpublished)). In the case at hand, the lower court correctly reasoned that employers are not required to offer accommodations that are likely to be futile because even with the accommodation, the employee could not safely and

efficiently perform the functions of the job. E.R. 218; citing Schmidt at 997; Buck at 1408 (D.C. Cir. 1995).

B. Although it was not required to reasonably accommodate Plaintiff, Albertsons made reasonable offers to Plaintiff for other positions available.

The ADA does not impose upon an employer any affirmative duty to find another job for an employee who is no longer qualified for the job he or she was doing, but requires an employer not preclude an employee from alternative employment opportunities reasonably available under existing policies. Marschand v. Norfolk and Western Railway Company, 876 F.Supp. 1528, 1542 (N.D. Ind. 1995) (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 289 n. 19, 107 S.Ct. 1123, 1131-32 n. 19, 94 L. Ed.2d 307 (1987)). While Albertsons did not believe Plaintiff was "otherwise qualified" to drive a commercial vehicle, it still considered him for and offered to him other jobs. King Affidavit ¶5, Supp. E.R. 67. Plaintiff admitted the position of Yard Hostler (moving trailers at the Distribution Center) was offered to him (Kirkingburg Dep. p. 77; Supp. E.R. 3). Plaintiff also admitted he was offered the position of Tire Man. Kirkingburg Dep. pp. 84-85; Supp. E.R. 4-5. The position of Yard Hostler was withdrawn after it was offered to (but not accepted by) Plaintiff when Albertsons became aware that the position required DOT certification. Riddle Dep. p. 55, Supp. E.R. 60. Plaintiff refused the Tire Man position. Kirkingburg Dep. pp. 85-87, Supp. E.R. 5-7, Norris Dep. p. 18, Supp. E.R. 42. Even under "reasonable accommodation" duties, employers are not required to offer employees the position of their choice. Marschand at 1543. "The bottom line . . . is simply that the employer must offer the employee a reasonable accommodation." Id. (citing Kerno v. Sandoz Pharmaceuticals Corp., 1994 WL 511289 (N.D. Ill. 1994)).

Even if there was a duty to reasonably accommodate,

Albertsons met it. Here there was no such duty because Plaintiff was not "otherwise qualified".

III. Whether the District Court Properly Held That Defendant Could Rely on Department of Transportation Vision Standards and Need Not Make an Individual Assessment of Plaintiff's Ability to Drive a Commercial Vehicle.

Plaintiff's argument that Defendant should have made an "individualized assessment" of his visual impairment was correctly rejected by the lower court. The lower court properly held as a matter of law that (1) Albertsons could rely upon the DOT vision standards and (2) that Albertsons did not need to make an individual assessment of Plaintiff's ability to drive. Court Order and Opinion, p. 8, E.R. 219. (The lower court cited to Buck at 1408-1409 (Federal Highway Administration (hereafter "FHWA") stating employers are not required to make individualized assessment of deaf truck drivers who did not meet established physical qualification standards in 49 CFR §391.41(b)(11)); Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991), cert. denied, 503 U.S. 959 (1992) (FHWA was not required to make individualized assessment of driver who did not meet physical qualification standards of 49 CFR §391.41 because of history of epilepsy). The FHWA's undertaking of an experimental vision-waiver study does not change the analysis when the FHWA itself has not proposed, much less implemented, any changes to the visual acuity standards in its regulations.[9]

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[9]Nor is it relevant that the plaintiff had driven previously as a truck driver when he was erroneously certified as qualified to drive under the FHWA's regulations in the past. It is also irrelevant whether Plaintiff's doctor determined his condition would not interfere with his ability to drive or that he was not asked to submit to another exam or gathering his medical history.

The ADA allows employers to rely on established federal health and safety standards in setting minimum qualifications for jobs. The established federal standard for visual acuity for commercial motor vehicle operators in set out in 49 CFR §391.41(b)(10). The Company adopted this standard as a minimum qualification for its truck drivers. Albertsons has always deferred to the medical certifications of its examining physicians, as evidenced by their completion of the DOT certification cards. Jardine Affidavit ¶4, Supp. E.R. 68-69; Sturgill Dep. pp. 24, 34, Supp. E.R. 46, 49. However, Plaintiff never met the vision standard therefore never was "otherwise qualified" for the job of truck driver. In order for this Court to find that plaintiff was ever "qualified," it would have to hold that Albertsons is under some legal obligation to participate in the FHWA vision-waiver experiment. It was not.

The lower court properly held that the law does not impose an obligation for an employer to accept a waiver. Court Opinion p. 8, E.R. 218. Plaintiff has not identified anything in the ADA to the contrary. The FHWA notice of November 17, 1994 makes it quite clear that the purpose of the waiver program was to provide some data to indicate just how safe these drivers are. The notice also makes it clear that previous FHWA monitoring of the drivers' performance had left much to be desired. The ADA does not mandate employer participation in such federal experiments, and certainly does not require Albertsons to accept the risks of liability presented by employing a driver who is below the minimum standards set out in Federal law.

Plaintiff argues on appeal that Chandler, supra, should be discounted under Sarsycki v. United Parcel Service, 862 F.Supp. 336 (W.D. Okl. 1994), because it is a post-Chandler

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Clearly, the employer cannot be held responsible for the physicians' disregard for the standards nor does it change the fact that Plaintiff does not meet the standards currently set out in 49 CFR §391.41(b)(10).

case that is

"undermined by the fact that the FHWA has recently instituted a waiver program for . . . drivers of commercial motor vehicles which the FHWA believes is 'consistent with the safe operation' of those vehicles." Sarsycki at 341.

Plaintiff's premise is undermined by the fact that the experimental vision-waiver program referred to in Sarsycki was invalidated on August 2, 1994. *See* Advocates for Highway Safety v. Federal Highway Administration, 28 F.3d 1288, 1294 (D.C. Cir. 1994). The Advocates for Highway Safety court specifically found that the Federal Highway Administration adopted the waiver program contrary to law as it failed to determine that a waiver would be consistent with the safe operation of commercial motor vehicles. Id. (emphasis added). The agency on remand examined the rule and corrected the defect, but admitted, "flaws in the current research method ***[and] the data developed by the study will never answer the question as to what the standards should be." 59 Fed. Reg. 59389.

The lower court relied on Chandler, which found that a truck driver with impaired vision who does not meet DOT vision requirements cannot be reasonably accommodated because he presents a genuine substantial risk that he could injure himself or others. E.R. 219; Chandler at 1395. A "direct threat" determination was not required as outlined in 29 CFR §1630.2(r), since the lower court found, as a matter of law, Plaintiff's vision impairment was a "significant risk of substantial harm to the health or safety of the individual or others." Chandler at 1395. Consequently, an employer is not required to accept a waiver.

IV. Whether the District Court Properly Held That Defendant Was Not Required to Make a Reasonable Accommodation by Transferring Plaintiff to a Yard Hostler Position or Some Other Available and Suitable

Position.

Plaintiff on appeal raises a new issue, not raised below or contained in his Amended Complaint, that he had a state statutory right to reinstatement. *See* Amended Complaint, E.R. 1-3; Court Order and Opinion, E.R. 211-220; Court Denial for Reconsideration Order, E.R. 223-225. Further, Plaintiff now tries to link this previously unraised issue to a duty to reasonably accommodate Plaintiff by facilitating his return to work. Finally, Plaintiff now argues that under the state law for injured worker reinstatement, Albertsons had a legal obligation to return Plaintiff to his former position or a suitable alternative. This Court should not consider Plaintiff's argument, as it is being raised for the first time on appeal. *See* Spurlock v. F.B.I., 69 F.3d 1010, 1017 (9th Cir. 1995).

Assuming Plaintiff could now raise arguments under ORS §659.415, claiming he had reinstatement rights to his former position under state workers' compensation law, his argument would fail. Reinstatement rights to the worker's former position of employment are invoked, "upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position." ORS §659.415(1). (Emphasis added.) Under Oregon Administrative Rules interpreting ORS §659.415, one requirement is that the injured worker must be physically able to perform the duties of the former position. O.A.R. 839-06-130(1)(b). As discussed above, Plaintiff did not meet the physical vision requirements and thus could not perform the essential duties of the position. Therefore, Plaintiff was not covered under ORS §659.415.

Plaintiff also claims belatedly, under ORS §659.420, that he had reinstatement rights.[10] To qualify under

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[10]Citing both ORS §659.415 and ORS §659.420, Plaintiff argues that he had a right to his former job or, if unavailable, another

ORS §659.420, Plaintiff essentially must argue he was disabled from performing the duties of his former job. Plaintiff cannot logically make that argument without undoing his prior arguments. Additionally, Plaintiff did not show below that there was an "available and suitable" position when he was terminated.[11] Court Order p. 2, E.R. 224. There is nothing in the record on this point.

Further, Plaintiff was offered the position of Tire Man, which he rejected. Kirkingburg Dep. pp. 84-85, Supp. E.R. 4-5 . Under both ORS §659.415(3)(a)(D) and ORS §659.420(3)(d), the right to reinstatement and reemployment (respectively) terminates when the worker "refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming

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which was available and suitable. Plaintiff's Br. p.2. This mistakes the intent of ORS §659.420.

[11]No material factual evidence was presented and the lower court properly found, "plaintiff has not shown that the yard hostler position was vacant when he was terminated. Even if the yard hostler position was vacant, driving was an essential function of that job." Court Denial for Reconsideration Order p. 2, E.R. 224 (emphasis added).

Also the lower court properly found, "An employer is not required to offer an accommodation that is likely to be futile because, even with the accommodation, the employee could not safely and efficiently perform the essential functions of the job." Court Order and Opinion, p. 7, E.R. 218. (Schmidt v. Safeway, Inc., 864 F. Supp. 991, 997 (D. Or. 1994)). *See also*, Marschand v. Norfolk and Western Ry. Co., 876 F. Supp. 1528, 1543 (D. Ind. 1995) (employer not required to reassign disabled employee to vacant position unless employee is qualified for position). Court Denial for Reconsideration Order, pp.2-3, E.R. pp. 224-225.

medically stationary." [12]

CONCLUSION

For the foregoing reasons, the decision of the District Court for the District of Oregon granting Appellee Albertsons' Motion for Summary Judgment should be affirmed.

DATED this 8th day of October, 1996.

Respectfully submitted,

s/ Corbett Gordon
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s/ Michael V. Tom
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(Certificate of Service omitted in printing)

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[12]Further, more than three years have passed since Plaintiff's injury (December 21,1991, *See* Kirkingburg Dep. pp. 37, 91, E.R. 37, 50), which would terminate any right to reinstatement or reemployment under both ORS §659.415(3)(a)(F) and ORS §659.420(3)(f).